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THE COMMUNICATIONS OPPORTUNITY, PROMOTION, AND ENHANCEMENT ACT OF 2006

HEARING

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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THE COMMUNICATIONS OPPORTUNITY, PROMOTION, AND ENHANCEMENT ACT OF 2006

THURSDAY, MARCH 30, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:08 a.m., in Room 2123 of the Rayburn House Office Building, Hon. Fred Upton (Chairman) presiding.

Members present: Representatives Bilirakis, Stearns, Gillmor, Whitfield, Cubin, Shimkus, Pickering, Radanovich, Bass, Walden, Terry, Ferguson, Blackburn, Barton (ex officio), Markey, Engel, Wynn, Doyle, Gonzalez, Inslee, Boucher, Pallone, Gordon, Rush, Stupak, Dingell (ex officio), Solis and Buyer.

Staff present: Howard Waltzman, Chief Counsel for Telecommunications and the Internet; Kelly Cole, Counsel; Billy Harvard, Legislative Clerk; Anh Nguyen, Legislative Clerk; Jaylyn Jensen, Senior Legislative Analyst; Neil Fried, Counsel; Will Nordwind, Policy Coordinator; Peter Filon, Minority Counsel; Johanna Shelton, Minority Counsel; David Vogel, Minority Research Assistant; and Chris Treanor, Minority Staff Assistant.

MR. UPTON. Thank you, Mr. Vice Chairman. Good morning. Today's hearing is on the Communications Opportunity, Promotion, and Enhancement Act--bipartisan legislation introduced by Chairman Barton, Mr. Rush, Mr. Pickering, and myself. I want to thank those Members in particular for their tremendous bipartisan cooperation, input and work.

The whole effort with this legislation is about removing the governmental roadblocks which are getting between consumers' wallets and the increased competition, lower prices, greater choice, and better service quality in the video marketplace which they desperately deserve. In the 21st century, with cable and two competing national satellite TV providers, which have about a quarter of the MVPD marketplace, technology has put the days of one-video-provider-per-town behind us; and with phone companies poised to offer yet another competitive video choice to consumers, we can truly kick competition into high gear.

Yet with approximately 33,000 local franchise authorities nationwide, the current locality-by-locality-by-locality franchise negotiation process is standing in the way of progress. So, it is time to bring that process into the 21st century--to catch up with the changes in technology and the marketplace--so that the consumer can reap the benefits as soon as possible.

This bipartisan legislation marries up three mutually important principles.

First, it establishes a national franchise option to streamline entry into the marketplace and speed-up delivery of more competitive video choices for consumers.

Second, the bill not only preserves the option for cable operators and localities to strike their own local franchise deals in lieu of a national franchise, but also preserves--in the national franchise--critically important elements of the legacy local franchise framework, namely: number one, local control over rights-of-way; two, a franchise of up to five percent of gross revenues; three, required carriage of public, educational, and governmental programming, PEG; and four, an additional one percent of gross revenues on top of the five percent franchise fee for PEG and institutional network support.

Third, the bill seeks to create a level regulatory playing field for all wireline video providers, given the competitive nature of the marketplace so that the consumers--and not the government--will choose the winners and losers in the marketplace.

Moreover, I want to highlight another important element of the bill which I believe will also be of great value to local governments. Title IV of the bill prohibits States from preventing local governments from providing telecommunications information or cable services. In my view, if a local government wants to provide, or facilitate the provision of, its own services for the benefit of its citizens, then our national communications policy should be able to permit that.

In closing, I want to also mention all of the work that Mr. Dingell and Mr. Markey invested with us in this issue. It is my hope that we can build on the bipartisanship of the legislation before us today. I look forward to working with them, Members who have also spent a lot of time on the issue like Mrs. Blackburn, Mr. Wynn, Mr. Buyer, and all members of this subcommittee and committee in the days to come. It is our attention to markup this legislation in subcommittee next week, and move towards full committee markup shortly after the Easter District Work Period ends.

Again, I want to commend Chairman Barton, Mr. Rush, Mr. Pickering, and their staff, all staffs for getting us here today. I look forward to the testimony of today's witnesses and I yield to the Ranking

Member of the subcommittee, the gentleman from Massachusetts, my friend, Mr. Markey.

[The prepared statement of Hon. Fred Upton follows:]

PREPARED STATEMENT OF THE HON. FRED UPTON, CHAIRMAN, SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

Good morning. Today's hearing is on the *Communications Opportunity, Promotion, and Efficiency Act* -- bipartisan legislation introduced by Chairman Barton, Mr. Rush, Mr. Pickering and myself. I want to thank those Members for their tremendous, bipartisan cooperation, input, and work.

This whole effort is about removing the governmental roadblocks which are getting between consumers' wallets and the increased competition, lower prices, greater choice, and better service quality in the video marketplace which they desperately deserve.

In the 21st century, with cable and two competing, national satellite television providers, which have about a quarter of the MVPD marketplace, technology has put the days of one-video-provider-per-town behind us; and with phone companies poised to offer yet another competitive video choice to consumers, we can really kick competition into high gear.

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Second, the bill not only preserves the option for cable operators and localities to strike their own local franchise deals in lieu of a national franchise, but also preserves -- in the national franchise -- critically important elements of the legacy local franchise framework, namely: (1) local control over rights-of-way; (2) a franchise fee of up to 5% of gross revenues; (3) required carriage of public, educational, and governmental (PEG) programming; and (4) an additional 1% of gross revenues – on top of the 5% franchise fee -- for PEG and institutional network support.

Third, the bill seeks to create a level regulatory playing field for all wireline video providers, given the competitive nature of the marketplace, so that consumers – and not the government – will choose the winners and losers in the marketplace.

Moreover, I want to highlight another important element of the bill, which I believe will also be of great value to local governments. Title IV of the bill prohibits states from preventing local governments from providing telecommunications, information, or cable services. In my view, if a local government wants to provide, or facilitate the provision of, its own services for the benefit of its citizens, then our national communications policy should be to permit that.

In closing, I do want to mention all of the work that Mr. Dingell and Mr. Markey have invested, with us, in this issue. It is my hope that we can build on the bipartisanship of the legislation before us today, and I look forward to working with them, Members who have spent a lot of time on this issue like Ms. Blackburn, Mr. Wynn, and Mr. Buyer -- and all Members of this Subcommittee and Committee -- in the days to come. It is my intention to mark-up this legislation in Subcommittee next week, and move toward full Committee mark-up after the Easter District Work Period.

Again, I want to thank Chairman Barton, Mr. Rush, and Mr. Pickering – and their staffs – for getting us here today, and I look forward to the testimony of today's witnesses.

MR. MARKEY. Thank you, Mr. Chairman, my friend, as well. We are calling this hearing on this very important legislation which addresses various subjects, and although there are a multitude of issues in this bill including several provisions I wholeheartedly support, such as the ability of municipalities to provide community broadband services, I will focus my remarks this morning on just two items.

First, network neutrality. In my view, rules ensuring network neutrality are indispensable. I understand that there are those who argue that we should rely on mere network neutrality principles or an imprecisely worded FCC policy statement rather then legally enforceable rules. Others will advise us to take a wait-and-see approach. Yet we know from public statements from several industry executives that the owners of the broadband wires into our homes would like to start charging fees to Internet content providers. In other words, they want to artificially constrain the supply of Internet-based content and services to high bandwidth consumers. This represents nothing more than the imposition of a broadband bottleneck tax on electronic commerce. Such a bottleneck tax for accessing consumers will undoubtedly have a chilling effect on investments and innovation.

There are some out there who will inevitably ask the question, but why shouldn't Google pay? Google certainly has a very large market gap and presumably could afford to pay, but that is precisely the wrong question to ask. The question to ask is whether Larry Page and Sergey Brin could have afforded to pay around 1998, whether Yahoo Chief Jerry Yang could have afforded to pay a broadband behemoth around 1995, whether Mark Andresen, the founder of Netscape, could have afforded to pay anyone anything around 1994. If there is an entrepreneur in some proverbial garage somewhere today whose idea is new, whose product is still in beta, their dreams are just as real and valid as Sergey's and Larry's and Jerry's and Mark's were an Internet generation ago. We should be doing everything we can in public policy to ensure that this successful Internet model continues to drive innovation, economic growth, and job creation.

Instead, the proposed bill before us effectively condones online discrimination and then ties the hands of the agency from promulgating any guidelines to address it. The Barton bill actually says to the FCC that it can never adopt rules to protect the Internet experience for the millions of entrepreneurs and consumers who rely upon it. Think about that. If there is a problem, even if it widespread or affects a whole class of users or a whole class of violators, if consumers are being aggrieved

on a daily basis or even if industry itself feels that certain rules are useful or necessary, the Barton bill prohibits any rulemaking authority for the FCC on network neutrality whatsoever. Rather, it prefers a case-by-case investigation and adjudication of violations. Does anyone here remember how long it takes the FCC to deal with individual complaints? It often takes years. And this bill is supposed to prepare us for the 21st century broadband future. This is efficient government? I don't think so. No, that is neither futuristic nor efficient. That is chaos. In short, the bill imperils the future of electronic commerce and innovation to the www, the worldwide whims of broadband barons and ties the hands of the agency in a way that will legally prevent it from saving something very special.

And second, service area parity. I want to briefly address the proposed bill's lack of a cable service area requirement. By failing to include a build-out provision to ensure service area parity between a Bell company entering a franchise area and the incumbent cable operator, the bill allows a national franchisee to use public rights-of-way in a community but serve only select neighborhoods within that community. One does not need a business degree to have a hunch that they will focus deployment on the 30 percent of the town that has 70 percent of the revenue potential. The bill, however, compounds the consumer risk when the omission of a service area requirement is considered in the context of an incumbent cable operator qualifying for a national franchise. Under the proposal, an incumbent cable operator may similarly seek a national franchise after the phone company arrives in a franchise area even if the phone company is serving just one household in the franchise area. The lack of a service area requirement at the national level then means that the incumbent cable operator no longer has to serve the entire franchise area either.

This means that the incumbent cable operator will now be free to skimp on service upgrades or withdraw service from any part of their historic service area. The incumbent cable operator may also immediately raise rates in areas of the community the phone company is not serving in order to cross-subsidize its offering in the part of town the phone company has chosen to serve. In other words, although the proponents of the bill will trumpet the notion that consumers will receive lower prices, the reality for many consumers is that the bill will unwittingly result in the opposite: higher prices, shoddier practices, lack of technology upgrades, or outright withdrawal of service. This represents a truly historic abandonment of decades of policy and progress to get technology and competition out to all Americans regardless of where they live. It is clearly a grave consumer protection flaw in the bill that needs to be addressed. I thank you, Mr. Chairman, for your

indulgence in giving me a little extra time in my opening statement in this historic hearing.

MR. UPTON. I am taking it from your minutes of questions. No, I am not. I would like to make a unanimous consent request that both Ms. Solis and Mr. Buyer who are not members of the subcommittee but able to sit in and participate, and without objection so ordered. I yield at this point for an opening statement to the gentleman from Florida, Mr. Bilirakis.

MR. BILIRAKIS. Thank you, Mr. Chairman. Mr. Chairman, I think that everyone agrees certainly that technology has a dramatic impact on our daily lives. Today there is ever growing competition in a wide variety of areas. Cell phones, for example, continue to get smaller and smaller with expanding capabilities. I am amazed that it is possible to watch television on a cell phone. Individuals can find any number of service plans that suit their communications needs at competitive rates. It is only natural that consumers want to see greater and greater choice when it comes to the services and products that are available in their homes.

The legislation we are examining today is intended to spur competition in the video market. While I do believe it is important to expand consumer choice and options, I am concerned that we take into account the critical role that local governments play in the video market. Although I do not believe that local governments and local franchising authorities should act as a barrier to greater competition, they do have a responsibility to protect and maintain local infrastructure and safeguard consumers. So I believe it is important that they continue to have the ability to act in the public interest, and in that regard I am anxious to hear from our wide array, and they are a wide array, of witnesses today to get their perspectives on this legislative proposal. Mr. Chairman, thank you. This is a very complicated bill. I know as a result of hearings like this we are going to learn much more about it. Thank you, sir.

[The prepared statement of Hon. Michael Bilirakis follows:]

PREPARED STATEMENT OF THE HON. MICHAEL BILIRAKIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Thank you, Mr. Chairman.

I think everyone agrees that technology has a dramatic impact on our daily lives. Today, there is ever growing competition in a wide variety of areas. Cell phones, for example, continue to get smaller and smaller with expanding capabilities. I am amazed that it is now possible to watch television on a cell phone. Individuals can find any number of service plans that suit their communications needs at competitive rates. It is only natural that consumers want to see greater and greater choice when it comes to the services and products that are available in their homes.

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concerned that we take into the account the critical role that local governments play in the video market. Although I do not believe that local governments and local franchising authorities should act as a barrier to greater competition, they have a responsibility to protect and maintain local infrastructure and safeguard consumers. I believe it is important that they continue to have the ability to act in the public interest. In that regard, I am anxious to hear from our wide array of witnesses today to get their perspectives on this legislative proposal.

Thank you, Mr. Chairman. I look forward to working with you and my colleagues on this important issue as we move forward.

MR. UPTON. I recognize Mr. Dingell for an opening statement.

MR. DINGELL. Mr. Chairman, I thank you for your courtesy and I thank you for having this hearing. The title of this hearing might be a funny thing happened on the way to the forum. We are well on the road to achieving a bill which could have had broad bipartisan support, could have addressed in a real way the concerns of the American people, could have allowed the Bells to enter into a national franchise and to have achieved it in a way which would not only have been fair to American consumers, but which could have been broadly accepted throughout the industry and which would have had support of Members on both sides. It was interesting to note how close we were when all of a sudden the wheels came off and all of the lashings wrapped around the axle and everything stopped.

This is an important bill for American consumers and for our economy. I want to make it clear that I had and hope to again be a supporter of a national video franchise. I would note that I have been a long-term friend of the Bell companies but I do not support the legislation being discussed today because it is unfair, unwise, and bad public policy. As drafted, the proposed legislation would allow the creation of the broadband equivalent of gated communities in our towns, our cities, our countryside as well as on the Internet. Public rights-of-way would be hijacked for the profits of large private companies which are under this draft freed of the important obligations to serve the public. I support fair competition, but this bill does not create fair competition. We should not write legislation at the expense of leaving some of our communities or some of our citizens behind and we should not write legislation at the expense of a free and innovative Internet. Of course, some areas of our country would likely see faster competition and lower cable rates as a result of national franchising--some. But according to this draft, these benefits will not extend to everyone or everywhere. Significant areas of our country will be left behind and not all families in the family community will share in the competitive showdown. So the less desirable or more remote parts of a town or the less affluent parts of that town may see the cable rates increase or watch as providers upgrade service to other parts of the town and pass them by. With many

consumers put at risk by paying higher cable bills or even losing cable service, this bill violates the fundamental legislative principle of first do no harm. So there are tough questions that we have to ask about this legislation, and we will ask them.

First, why are there no real protections to ensure that communities and neighborhoods will not be left behind as new telecommunications infrastructure is deployed? When it comes to using public rights-of-way to offer cable service, the current framework has worked in allowing a build-out over a reasonable period of time at the local level. Why should we abandon the system of universal service that has served this nation so well in terms of a profit-making opportunity for companies of great affluence at the expense of people of limited means?

Second, when cable operators who become national franchisees are released from obligations to serve or upgrade certain parts of town, how will those residents be affected? I think everyone knows the answer to that. Does this create a legal entitlement to differing services and differing levels of service depending on the demographics of a neighborhood? It certainly looks that way.

Third, will the unfortunate result of this bill be years of litigation? The national franchise requirements contain many ambiguities. For example, are new methods of video delivery covered or should the 1984 constructs be updated to provide technology-neutral approach to cable service? Those cities continue to receive fees associated with video services when these services are integrated with other capabilities. Will some of the people who will be beneficiaries of this legislation be able to claim that they are not cable providers and thus escape major parts of their responsibilities? That is a question that we intend to inquire into with more than a little care.

Fourth, the proposed legislation contains some curious language regarding the issue of network neutrality. What would be the effect of allowing essentially private taxation of the Internet? Would the digital economy continue to thrive? Would consumer expectations be met? Would treatment be fair to all or would people be enriched in improbable and improper ways?

In some ways, this bill clearly benefited from the lengthy bipartisan discussions held over the course of last year and I want to commend my colleagues who have participated in those. In general, the bill generally reflects the value to our citizens of franchise fees and the continuation of support of diverse public educational and governmental programming. It recognizes at least in concept that local governments play a constructive role in the oversight of the communications infrastructure and the protection of consumers. It also recognizes that they are going to provide the rights-of-way and things which are so important to having

this kind of thing move forward. But it leaves other areas of local responsibilities, rights, and privileges as well as duties of the licensees or franchisees very much unclear. Also troubling, the legislation preempts state and local consumer protection laws and it assures no strong or enforceable federal protections. We are stripping citizens of something that they and their governments have been able to do for them over the years.

This committee has deregulated cable service before. Not all of us will remember it. But we have only then later had to step in to address shoddy treatment and poor treatment of consumers.

Mr. Chairman, I thank you for holding this hearing. The draft raises many questions which must be answered carefully. I am not sure that the process is going to achieve that purpose but we are going to try and see that it does. It is one thing to promise a new day of competition. It is quite another to deliver, especially since the legislation and the vehicle has the number of visible and obvious errors that we see before us. We do not want to leave millions of Americans vulnerable, having to cope with no new services with higher cable rates, with fewer competitive choices on the Internet, and a situation which clearly favors certain providers and clearly favors certain categories of Americans over others. Thank you, Mr. Chairman.

MR. UPTON. Thank you. I recognize for an opening statement the Chairman of the full committee, the gentleman from Texas, Mr. Barton.

CHAIRMAN BARTON. Thank you, Mr. Chairman, for holding this important legislative hearing. Today is the culmination of over a year and a half of discussions by Members on both sides of the aisle of this subcommittee and full committee, and if you really look at it, it is half a decade of discussions by the stakeholders about the need for a new telecommunications act. Previous attempts at increasing innovation, choice, and lower prices for consumers have focused on promoting competition within individual sectors of the communications industry. Time has shown, however, that the best way to promote competition and innovation is to encourage the deployment of advanced facilities-based networks and competition across sectors. The right approach will invigorate the technical sector and produce jobs, growth, and opportunity for all of America. American consumers will get an array of services and choices that were unimagined just a few years ago.

This is the approach the committee print before us seeks to take with respect to increased cable competition and the deployment of advanced broadband networks. Cable service is interstate in nature, as the Supreme Court has long recognized. Most video programming carried on cable systems is produced by national networks and distributed across State lines to a national audience. Cable systems are also carrying

increasing amounts of Internet-based video, voice and data services that cross State, as well as national, borders.

Today there are thousands of local franchising authorities, and each imposes disparate restrictions on the provision of cable services in its particular franchising area. The requirement to negotiate such local franchises and the patchwork of obligations local franchising authorities impose, are hindering the deployment of advanced broadband networks that will bring increasingly innovative and competitive services to consumers. The United States is not even among the top ten nations in terms of broadband deployment right now.

The committee print seeks to address this concern and strike the right balance between national standards and local oversight. Thus, the committee print before us first of all preserves municipalities' existing authority to collect a franchise fee of up to five percent of gross revenues from cable service. Second, it also preserves the municipalities' control over their local right-of-way. Third, it continues to require carriage of public, educational, and governmental channels, otherwise known as PEG channels, and allows municipalities to increase the number of PEG channels over time. It also preserves the institution networks used for governmental and other public safety purposes. It also allows municipalities to collect an additional one percent of gross revenues to support PEG channels and institutional networks. It also allows municipalities, if they wish, to continue to negotiate a local franchise agreement. It requires the FCC, the Federal Communications Commission, to establish national consumer protection and customer service standards that the municipalities may then enforce.

At the same time, the committee print offers an alternative, streamlined national franchise process. This will help expedite competitive cable entry, thereby promoting the deployment of advanced broadband networks that can offer new and exciting broadband video, voice and data services.

We have had multilateral discussions for a number of months with several members on the Minority side of the aisle. Those discussions did not bear the total fruit that I thought they would. Having said that, we have entered into discussions with Congressman Rush and he has signed on as an original sponsor of the committee print. We are very, very pleased to have Congressman Rush's support of the committee print before us. I also want to thank Congressman Pickering and Congressman Upton for their strong work. I would like to thank Mr. Dingell and Mr. Markey for their work as well, although they have not signed on to the committee print before us.

I hope that other members from both sides of the aisle would take a serious look at the legislative draft before us today and join us in

supporting the draft next week when we mark it up in the subcommittee. I look forward to today's testimony and to next week's subcommittee markup, and to marking it up in full committee within the next four or five weeks. With that, Mr. Chairman, I yield back.

[The prepared statement of Hon. Joe Barton follows:]

PREPARED STATEMENT OF THE HON. JOE BARTON, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

Mr. Chairman, thank you for holding this hearing. We stand on the threshold of a new age in communications. The 1996 Telecommunications Act served an important purpose, but technology and the markets have moved on.

Previous attempts at increasing innovation, choice, and lower prices for consumers have focused on promoting competition within individual sectors of the communications industry. Time has shown, however, that the best way to promote competition and innovation is to encourage the deployment of advanced, facilities-based networks and competition ACROSS sectors. The right approach will invigorate the tech sector and produce jobs, growth and opportunity for its workers. American consumers will get an array of services and choices that were unimagined just a few years ago.

This is the approach the committee print seeks to take with respect to increased cable competition and the deployment of advanced broadband networks. Cable service is interstate in nature, as the Supreme Court has long recognized. Most video programming carried on cable systems is produced by national networks and distributed across state lines to a national audience. Cable systems are also carrying increasing amounts of Internet-based video, voice, and data services that cross state, as well as national, borders.

Today, there are thousands of local franchising authorities, and each may impose disparate restrictions on the provision of cable service in its local franchising area. The requirement to negotiate such local franchises, and the patchwork of obligations local franchising authorities impose, are hindering the deployment of advanced broadband networks that will bring increasingly innovative and competitive services to consumers.

The committee print seeks to address this concern and strike the right balance between national standards and local oversight. Thus, the committee print:

- Preserves municipalities' existing authority to collect a franchise fee of up to 5 percent of gross revenues from cable service.
- Preserves their control over local rights-of-way.
- Continues to require carriage of public, educational, and governmental channels, referred to as PEG channels, and allows municipalities to increase the number of PEG channels over time.
- Preserves institutional networks used for governmental and other public safety purposes.
- Allows municipalities to collect an additional one percent of gross revenues to support PEG channels and institutional networks.
- Allows municipalities to continue to negotiate local franchise agreements.
- Requires the Federal Communications Commission to establish national consumer protection and customer service standards that the municipalities may enforce.

At the same time, the committee print offers an alternative, streamlined national franchise process. This will help expedite competitive cable entry, thereby promoting the deployment of advanced broadband networks that can offer new and exiting broadband video, voice, and data services.

I thank Congressman Rush, the Chairman, and Mr. Pickering for sponsoring this bipartisan legislation with me. I hope that other Members from both sides of the aisle will join us in supporting the bill. I look forward to today's testimony and to an expedited Subcommittee markup of the legislation. I yield back.

MR. UPTON. Thank you. Mr. Engel?

MR. ENGEL. Thank you, Mr. Chairman. I am going to condense my remarks, and I thank my colleagues for letting me jump over them. I have to co-chair a hearing in about three minutes and I will return to the hearing. I want to thank you, and I realize that not all of the committee's leaders were able to come to a compromise, but I believe that this bill before us reflects an enormous step forward from the previous bill called BITS II. My primary concern, like everyone else, is to do what is best for the people of my district and State, and for half the population of my district, there is no viable competition in video services because of tall buildings, so I am forced to seek ways to bring competition to the video service industry. I believe that this legislation provides a road map by which all the traditional telephone companies and the incumbent cable service providers can move forward into a new era of competition. As Members of Congress, we obviously have to strike the balance that will promote competition without unduly benefiting one of those competitors, so I am pleased that there is language in this bill that provides for fair treatment of all communities and neighbors without regard to income level. I have pockets of vast poverty and enormous wealth and all of these people should be able to avail themselves of these new services. I understand the language regarding enforcement of so-called redlining is still under development so I look forward to developing strong, clear standards for enforcement.

I am also very pleased about the inclusion of 911 services for VOIP providers. I believe that it would be unconscionable for this Congress to adjourn without making this simple but vital change to our laws. It is a no-brainer that when someone is in medical distress or the house is on fire or someone has broken in, that the person calls 911. Such a call should go seamlessly. That having been said, we must also require our PSAPs to upgrade their equipment to handle these new technologies. New York remains the poster child of what not to do when it comes to cell phone 911 systems. Millions of dollars were collected in cell phone taxes and little actually spent on PSAP upgrades. The same thing cannot be allowed to happen again with VOIP.

I have one concern which I hope we will be able to work out as this bill moves forward. I understand that the bill does not impose on VOIP providers the same standards for disability access as other voice providers. As a longtime champion of disabled and equal regulatory

treatment, I want to work with the Chairman at finding a way of making this happen.

And finally, let me say that there are net neutrality provisions in this bill that many people have told me they are very upset about. I am hearing very different opinions about what this language means and how it will impact the future of the nation's telecommunications industry. I want to urge all parties to start working together to find common ground. I am open to listening to each and every argument but there are such vast differences in interpretation, I am just not sure what to think. So I thank the Chairman and my colleagues, and I yield back.

[The prepared statement of Hon. Eliot Engel follows:]

PREPARED STATEMENT OF THE HON. ELIOT ENGEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman:

I want to thank you, Mr. Barton, Mr. Dingell, Mr. Markey and your staff members for their hard work over the past many months.

Though not all of the Committee's leaders were able to come to a compromise, I believe the bill before us reflects an enormous step forward from the previous bill, called BITS II.

My primary concern is -- like everyone else here -- my primary concern is to do what is best for the people of my district and state. For half the population of my district there is no viable competition in video services. The fact that satellite is really not viable in the Bronx is matter of physics – it is not cable's fault nor satellite's. Neither they nor this Congress can alter the laws of physics – though I believe some members of Congress have tried on a number of occasions.

So I am forced to seek ways to bring competition to the video services industry. My constituents want this and they want it *yesterday*.

I believe that this legislation provides a road map by which all the traditional telephone companies and the incumbent cable service providers can move forward into a new era of competition.

As members of Congress we must strive to strike the balance that will promote competition without unduly benefiting one of those competitors.

I am pleased that there is language in this bill that provides for fair treatment of all communities and neighborhoods without regard to income level. I have pockets of vast poverty and enormous wealth. All of these people should be able to avail themselves of these new services.

I understand the language regarding enforcement of the so-called "red-lining" is still under development. I look forward to working with the Chairmen and ranking members and my good friend Bobby Rush in developing strong, clear standards for enforcement.

I am also very pleased about the inclusion of 911 services for VOIP providers. I believe that it would be unconscionable for this Congress to adjourn without making this simple, but vital, change to our laws. It is a no brainer that when someone is in medical distress, or their house is on fire, or someone has broken in that the person calls 911. Such a call should go seamlessly.

That having been said, we must also require our PSAPs to upgrade their equipment to handle these new technologies. New York remains the poster child of what *not to do* when it comes to cell phone 911 systems. Millions of dollars were collected in cell

phone taxes and little actually spent on PSAP upgrades. The same thing cannot be allowed to happen again with VOIP.

I have one concern which I hope that we will be able to work out as this bill moves forward. I understand that the bill does not impose on VOIP providers the same standards for disability access as other voice providers. As a long time champion of the disabled and equal regulatory treatment, I want to work with the Chairman on finding a way of making this happen.

There are net neutrality provisions in this bill that people are very upset with. I am hearing very different opinions about what this language means and how it will impact the future of the nation's telecommunications industry. I urge all parties to start working together to find common ground. I am open to listening to each and every argument, but there are such vast differences in interpretation, I am just not sure what to think.

I thank the chairman and yield back.

MR. UPTON. Yes, I would at this point ask unanimous consent that all members of the subcommittee be able to insert their opening statements as part of the record.

MR. ENGEL. Thank you, Mr. Chairman. I have Mr. Green's statement and I thank you for doing that.

MR. UPTON. Without objection, and also remind my colleagues that if they do not all read their statement, they will get an extra three minutes on the first round of questions, and at this point I would yield to Mr. Gillmor for an opening statement.

MR. GILLMOR. Thank you, Mr. Chairman, and I want to commend you and your staff for all of the time and the effort that you have put in to formulating this legislation. The latest committee print is aimed at furthering deregulating an industry that has the potential to revolutionize the way in which we do business, communicate with family and friends, and conduct everyday tasks. There are very few opportunities that exist like the one before the committee today, and I think we have to capitalize on that opportunity to avoid stunting the growth of this dynamic sector of our economy.

More than a decade ago, Congress deregulated the wireless industry and that venture has led to one of the most competitive and consumer-friendly marketplaces in the tech sector and I think that the committee print has the potential for laying a similar path for increased competition in video services. Streamlining the franchising process will ultimately result in lower consumer prices and greater access to advanced telecommunications services including in districts like mine. However, despite its good intentions, there will still be areas of the country where these services will not be immediately within reach for one reason or another. I think that title IV of the proposed bill strikes the appropriate balance by allowing public entities to enter into this dynamic market on a competitively neutral basis and I believe that the bill makes a concerted effort to ensure the localities maintain their ability to be effective stewards of the public domain. I want to point out one example which

came to my attention recently of the advantages of competition, and that was in France where I understand that since they have opened their markets to competition, it is possible now to get broadband Internet service, video, and telephone all from one provider for less than $40 a month, which is a far cry from anything that we see in this country.

This bill presents us with a unique opportunity to effectively increase marketplace competition and consumer choice while at the same time decreasing bureaucratic red tape and the amount that consumers pay for their services each month, and I yield back.

[The prepared statement of Hon. Paul E. Gillmor follows:]

PREPARED STATEMENT OF THE HON. PAUL GILLMOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Before I begin, I would like to thank you for holding this very important hearing and commend you and your staff for all of the time and effort put into formulating this legislation.

Mr. Chairman, after many months of debate and negotiation, I am pleased to be here today to listen to the panelists and discuss the latest committee print aimed at further deregulating an industry that has the potential to revolutionize the way in which we do business, communicate with family and friends, and attend to everyday mundane tasks. Very few opportunities exist like that which currently lies before this committee, and we must capitalize on this opportunity in order to avoid stunting the growth of this dynamic sector of our economy.

More than a decade ago, Congress took the leap of faith and deregulated the wireless industry—that venture has led to one of the most competitive and consumer-friendly marketplaces in the tech sector. After reviewing the committee print, it is my belief that this legislation will lay a similar path for increased competition in video services.

Streamlining the franchising process will ultimately result in lower consumer prices and greater access to advanced telecommunications services. In a rural district such as mine, I am excited of the possibilities that this legislation could yield, such as increased access of advanced broadband services for rural, agricultural communities, more and better programming options at consumers' fingertips, and increased safety of VOIP telephony services through the continued integration of E911. However, despite the well intentions of this legislation, there will still be areas of the country where these services will not immediately reach for one reason or another. Therefore, I believe that Title IV of the proposed bill strikes the appropriate balance by allowing public entities to enter into this dynamic market on a competitively neutral basis with commercial providers.

Finally, much has been said and will continue to be said about local control. As a former Ohio state senator, I believe that this bill makes a concerted effort to ensure that localities maintain their ability to be effective stewards of the public domain. Retaining the remittance of franchise fees, PEG channels, rights-of-way management, PEG support funding, and the ability to access fees for to rights-of-way management are just several examples of the extent that the Committee has gone to in order to ensure the preservation of local authority.

Mr. Chairman, I would like to conclude my statement by saying that Chairman Barton's bill, the Communications Opportunity, Promotion, and Enhancement Act, presents us with a unique opportunity to effectively increase marketplace competition and consumer choice, while at the same time decreasing bureaucratic red-tape and the amount that consumers pay for their service each month.

I look forward to the testimony from all of today's panelists and to the opportunity to ask several of them questions of my own as well as engage my colleagues in what is likely to be a lively debate. Again, thank you Mr. Chairman for holding this important hearing.

MR. UPTON. I recognize Mr. Boucher for an opening statement.

MR. BOUCHER. Thank you very much, Mr. Chairman. The bill that is before us today is a mere shadow of its former self. I regret that it has abandoned the valuable approach of earlier drafts which defined the permissible boundaries of the regulation of Internet applications and made certain that there would be a light regulatory touch. That measure which Mr. Stearns and I had advanced was not controversial. It achieved the necessary purpose. It is not to be in the thin measure that is now before us.

I support a one-stop Federal video franchise opportunity. I think it is essential in order to provide additional competition for cable television and satellite television consumers. The bill, in my view, appropriately addresses this need, and it also creates a greater legal certainty for municipalities that are seeking to offer commercial telecommunications service and I support those provisions.

The major shortcoming in the measure is the green light that it gives to a practice which I fear will undermine the openness and the accessibility of the Internet, qualities that have made the Internet a major driving force in the nation's economy. Some last-mile broadband providers have announced an intention to create a fast lane into the home for content providers who will pay them for fast-lane access and a slow lane for everyone else. In addition to limiting customer choice, I am deeply concerned that this two-lane plan will have a dramatic adverse effect on innovation. The startup struggling in a garage somewhere today will not be able to afford to pay the fees to get into the fast lane over the last mile and will be relegated to the slow lane. It is not going to be able to compete with the established Internet-based companies. The risk that permitting this dramatic change to the architecture of the Internet will dampen innovation is real. I think it is a risk that simply is not worth taking, and we don't have the luxury of simply sitting back and seeing how things work out.

Experience teaches us that when companies begin deriving revenues from a business model, it is exceedingly difficult to outlaw that model, and this is not something we are going to be able to take back. If we do nothing today and five years from now innovation has suffered and last-mile providers are deriving revenues from this new business plan of a two-lane Internet, a fast lane and a slow lane, it is going to be too late to make repairs, and so as a part of this bill, we need a genuine network neutrality provision, a provision that says that if a fast lane is necessary

perhaps for video or for gaming, then all applications of a similar kind, no matter who provides those applications, applications from any content provider of that kind should be entitled to fast-lane access without having to pay a charge.

Mr. Chairman, I look forward to the debate on this needed provision and I very much look forward to today's witnesses. Thank you.

MR. UPTON. Thank you. Mr. Shimkus?

MR. SHIMKUS. Thank you, Mr. Chairman. I am going to be real short. One is, I am going to use every public opportunity to remind people so they can talk to their parents and grandparents there are 46 days left for Medicare D signup so all you out there, all you smart people that can use the Internet, go to your grandmas and grandpas and your moms and dads, and if they are not signed up, get them engaged.

Second thing, the draft is good. I really can give the rest of my opening statement based upon what Eliot Engel said. The VOIP, the access to database, is a great part of the bill, and I appreciate that effort. I, as Members do, am struggling with this whole debate on net neutrality. Is the bill too hot, is the bill too cold? Can't we find something that is just right, and hopefully in this process we can do that. I yield back.

MR. UPTON. Mr. Stupak.

MR. STUPAK. Mr. Chairman, I will waive and save my three minutes for later. Thank you.

MR. UPTON. Mr. Pallone.

MR. PALLONE. Thank you, Mr. Chairman. I want to thank all of our witnesses for coming here today to discuss critical telecommunications issues and particularly mention the presence of Jeffrey Citron from Vonage, who both lives and has his headquarters in my home county of Monmouth, New Jersey.

I have long been a proponent of ensuring consumer choice and greater competition and I hope that this hearing will help us craft legislation that strikes a good balance between the two. It is long past time for us to update the Telecom Reform Act passed in 1996, and if done properly, our efforts could reduce rates for video content consumers. While the proposed legislation provides a good vehicle, there still remain many questions on how best to provide consumers competition in the video marketplace and I am interested in hearing the panel's views on how to ensure aggressive deployment measures in low-income and rural areas.

There are also many questions about how and to what extent the Internet should be regulated. I look forward to hearing how the witnesses feel about the net neutrality language included in the current legislation. I would also like to hear what we can do to ensure there is no

blocking, slowing down, or impeding of Internet traffic by content providers.

Telecommunications reform also brings up the issue of E-911. It is safe to say that all customers deserve access to life-saving E-911 networks and that is why guardians of the E-911 network or facilities should do all that they can to ensure that new services like voice over IP, have all the tools they need to provide consumers with enhanced emergency protections. I look forward to hearing why there are parts of the country taking longer to roll out access to E-911 service by voice over IP providers. Is this caused by technological hurdles or manmade obstacles?

Crafting appropriate legislation is a delicate process. We must balance the interests of local and State governments with the needs of business and fair competition and obviously achieving that goal is easier said than done. However, the one thing that we need to keep in mind is how Congress can best help all of these content providers and continue to expand services for the American consumer at a competitive price. Again, I thank all of you for coming in to talk about these issues with us. Obviously it is crucial. Thank you, Mr. Chairman.

MR. UPTON. Mr. Bass.

MR. BASS. Thank you very much, Mr. Chairman, and I want to thank you for holding this hearing. I think it is going to be informative and helpful. It is another step in what has been a long and I think fruitful debate, and I have been trying to think of a way to discuss this thin measure before us. I don't think there is anything wrong with thin measures. They are just as good as fat measures, in my opinion, and I have really had a mission throughout this debate that as we approach telecommunications, we want to create a system that encourages competition, lower prices, and better service. Tat more access to services in communities will lead to more innovative services and better services, which will lead to better competition, lower prices, and more attention to customers.

It always surprises me that in my hometown, I pay about $150 a month for high-speed Internet access, for television, and for telephone. That is more than n probably most of all of developed countries around the world, maybe some Third World nations, frankly, and I don't think that is right. I would like to see the efforts of our debate and our legislative work create an environment in which a town in my district, like Washington, can compete with a city like Washington, or the city of Berlin way up in the middle of Coos County, can compete with Berlin, Germany. That should be the objective, and I believe the bill does move significantly in this direction, firstly by including the municipal broadband provisions, which I was pleased to work with my friend from

Virginia on, and I recognize that municipal networks are not always going to be the right solution, but it is an option that ought to be preserved. I think the national franchise is a good idea but we ought to also consider giving the States the ability to have a franchise. We have States now that are doing it and doing it successfully, and what is good in one part of the country, what may be the priority in New Hampshire or Maine or Vermont or Indiana or any other State, Tennessee, might be different from what it might be in a more urban State like New Jersey or frankly Michigan. So having national franchise with a State option I think really addresses many of the issues that will lead to more access for people in different parts of the country.

The last issue which I would like to see debated is the issue of programming. We really need more information about how these retransmission contracts are constructed and how the process of bundling and tying together programs affects the ability of the distributors, especially if they are not big distributors, to provide new services and to provide the same breadth of services that may be provided in other areas. Again, I remind my friends that the objective here is to make sure that all the newest and most interesting products are available everywhere, not just in some places, that prices are competitive across the United States and that we have good services and we can compete over the Internet, understanding that the Internet and telecommunications is the new form of transportation, global transportation, and so with that, Mr. Chairman, I will submit my written statement for the record and thank you for holding this hearing.

[The prepared statement of Hon. Charles F. Bass follows:]

PREPARED STATEMENT OF THE HON. CHARLES F. BASS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW HAMPSHIRE

Before I begin, Mr. Chairman, I hope you know how appreciative I am – and I think many of us are – that we are having this additional opportunity to ask questions of these witnesses. This committee draft starts from a position of being vastly improved over previous versions and I am grateful for all the work put into the changes.

Mr. Chairman,

First, I am especially pleased that the section on municipal broadband networks is retained, and I appreciate the Committee's willingness to work with me and Congressman Boucher on this throughout the process. Although I recognize that municipal networks will not be a good solution for most communities, their options must be preserved.

In case there is any future judicial confusion on this point, we mean to allow cities and towns to build, promote, organize, operate, contract for, and in any other manner be involved in broadband network development and service provision. I hope that is clear enough.

Next, I am especially pleased that the franchise proposal has been significantly improved. Competition between service providers will lead to lower prices, better customer service, and more innovative products and content choices. Although legally

exclusive video franchise contracts are a thing of the past and most consumers have satellite choices available today, we know that head to head video competition between wired providers will be good for America, and I hope especially good for rural places in New Hampshire and elsewhere.

I do, however, think we can leave more of the franchising decisions outside of the beltway. I completely agree that 35 thousand communities would be too many to negotiate with – even though cable did it – if we are seeking to rapidly bring direct competition.

Over the past year, several states have taken aggressive action to address the lack of choices. Perhaps this Committee's consideration of nationalizing what had been a local prerogative has helped spur this activity – and for that Mr. Chairman you should applauded. Texas, Virginia, and Indiana have now enacted state-based franchise laws. Service providers have as a backstop a one-stop approval process that can be used to enter communities in these states. 9 other states have now begun considering similar legislation, and a few have operated that way for a longer period of time.

I think a federal franchise is a fine idea to get us started in the debate and maybe even a way to jump start competition, but I think it is worth considering that we provide the states further chance to experiment and develop unique franchises for their residents. This is something I am exploring and working on for when we begin active debate on this bill, and I'd like to ask a few related questions later today on this.

Finally, I think this debate must include programming issues and consideration of the manner in which the current system limits content choices that are available to consumers. We did not consider these problems during debate on the satellite reauthorization or DTV bills. I think that time has arrived.

During the satellite reauthorization debate, my highest priority was to ensure that my state's only network affiliate, WMUR in Manchester, could be accessed by residents of the entire state. The people in my four northernmost counties certainly consider themselves Granite Staters and not Mainers or Vermonters. Arcane and thoroughly obsolete DMA rules had prevented that access previously, and this Committee was good enough to accommodate our unique situation.

But the story did not end at the bill's enactment; a retransmission agreement still had to be reached before anyone could gain this new access. People who watch government policy making closely sometime compare it to sausage making. If that is true, then observing and being part of a retransmission agreement is like the process that begins the moment that sausage is consumed by a person. Getting chewed up is only the beginning, and frankly the most pleasant part.

We clearly must protect private property rights and we should not inject ourselves needlessly into market-driven negotiations. However, the DMA rules I already mentioned, network non-duplication rules, affiliate area exclusivity, program bundling, non-network owned affiliate agreement clauses, vertical programming ownership, and a host of other market-power creating factors have already conspired to tip the scale of market balance in one direction or another.

Although one might be able to argue that in aggregate the imbalances level out, it does nothing to help consumers in one area who have artificial restraints on their choices if consumers in another area are poorly served by some other restraint.

I find it hypocritical on its face that alternate distribution methods, such as direct episode-by-episode Internet downloads of the kind that forced the recording industry to turn its business model upside-down, can be offered by programmers who at the same time rail against changes to a distribution model that forces bundled services cloaked in seemingly false concern for localism and the independent broadcasters.

Members of this Committee time and time again have asked for information about programming costs and conditions only to be told that confidentiality clauses prohibit any

disclosure. Yet, all sides come back later to claim that they are being held hostage, abused, tortured, and raped and pillaged by the other side.

I say prove it. Show us. I think it is time we had some disclosure of these terms and conditions. Certainly information on any programming tied or leveraged to the use of the publicly provided airwaves isn't too much to ask.

MR. UPTON. Mr. Doyle.

MR. DOYLE. Good morning, and thank you, Mr. Chairman, for scheduling today's proceedings. Pittsburgh is increasingly becoming a center of high-tech businesses and jobs. However, my district also has one of the highest concentrations of senior citizens in America, the majority of which live on fixed incomes. A vibrant telecommunications industry is of vital importance to my district. I look forward to seeing consumers have competition for telephone, television, Internet, wireless, and more. All Pittsburghers will benefit from increased competition so long as they all have access to competition and so long as their only options aren't pricey packages of services that are bundled with a new kitchen sink. Franchises with local governments can ensure all that and more, but it remains to be seen whether the national franchises in this committee print will offer the same level of protection and availability.

As I began my service on this subcommittee, we discussed whether and how dozens of companies would provide telephone and DSL service. Now we are talking about whether and how to facilitate a mere two or three choices for television, phone calls, and the Internet. Currently, the United States is 16th in the world in the percentage of people with high-speed Internet at home. This is simply not acceptable if we want to be able to employ the millions of workers that we have told to get retained with technology skills, and it is not acceptable if we want our kids to have a future as bright as they deserve it to be.

I am sitting here with an open mind. I look forward to hearing from each of the witnesses and I hope they address how they think this bill can promote competition, lower prices, and improved service for every American. Thank you, Mr. Chairman, for holding, this hearing and I yield back the balance of my time for questions.

MR. UPTON. Thank you, Mr. Doyle. I would just announce to Members that we are expecting one vote at 11:00. Mr. Bass, the Vice Chair, is going to go and vote early and come back so we can continue the queue that we have towards the Members' opening statements. We are going to want to run through this vote so that we can continue and try to adjourn before early evening. Mr. Ferguson.

MR. FERGUSON. Thank you, Mr. Chairman. Thank you for holding this hearing and listening to Members' views concerning the best way to promote more competition in the marketplace and choice for our constituents.

I have been guided by two principles as we have gone through this whole process. One, what is the best way to service consumers today in terms of competition that will bring prices down. And number two, what is the best way to serve consumers in the long term, in terms of how we can encourage investment of capital and infrastructure and in new technology. It is for those reasons that I support the video choice provisions of this bill.

When we look at the provisions of this legislation and any potential amendments, we have to make sure that the provisions meet the overall goals that we are trying to achieve. The goal of this legislation should be more consumer video choice, more broadband deployment and not unwanted regulation of the Internet. The success of the Internet was built on its freedom from regulation and we should make a very strong effort to keep it that way. I would also like to commend the authors of the bill for making it a priority to ensure that all providers of video services are able to compete on a level playing field. Our goal should be to treat like services alike and to make sure that one competitor is not saddled with and disadvantaged by government regulations while another is free from those burdens. This bill I believe moves us in that direction.

I am also pleased to see that the VOIP E-911 issue is addressed. In the post-Katrina world, the issue of E-911 and redundancy in our communications network has become quite literally a matter of national security. During Hurricane Katrina, the mayor of New Orleans was able to set up a call center using the Vonage service of one of his aides, his first outside contact, allowing him to coordinate with President Bush and state and local authorities during a time of real emergency. This VOIP connection provided the redundancy in the network that served as a communications hub for an entire city at a critical time. This is a success story that demonstrates what happens when our regulatory regime encourages innovation and competition. In such an environment, new technologies are created and deployed to the benefit of consumers, often with substantial cost savings. Customers need access to life-saving E-911 networks regardless of which technology they use. That is why we need to ensure that new services like VOIP have all the tools they need to provide consumers with the enhanced protections that they deserve.

I want to congratulate Chairman Barton, Chairman Upton, Mr. Pickering, and Mr. Rush for crafting a bipartisan piece of legislation that promotes fair and effective competition for our constituents while promoting this committee's commitment to reducing regulation in the marketplace. I look forward to hearing our witnesses today, and I thank you, Mr. Chairman. I yield back.

MR. UPTON. Mr. Inslee.

MR. INSLEE. Thank you. It is true that the hottest places in Hell are reserved for those who preserve their neutrality but it is also true that the warmest seats in Heaven are reserved for those who want to preserve net neutrality, and the reason is, is that net neutrality will preserve the utility and the tremendous liberty of innovation that have made the Internet really the greatest tool for intellectual improvement and dynamic force since the invention of the printing press. And I am very concerned that the bill as currently drafted will allow an arteriosclerosis to develop in this circulatory system. This marvelous tool that has developed that has been freely available without the private taxes that Mr. Dingell alluded to, and while arteriosclerosis is a disease of the old in humans, it is a disease of the young and the Internet. Because when we start to impose these private taxes, the ones who get hurt are the young innovators, the garage innovators, the small business innovators, those who have not achieved the great success of the Googles of the world and it is for those young innovators that I think our committee ought to take a look at this bill and really make a firm statement to preserve net neutrality just not in wishes but in reality. And I am very concerned that the horse will be out of the barn if we do not act. Shots across the bow of net neutrality have already been fired in the press and we should not be in a position to say that we don't think the levees are going to be topped. They are going to be topped here if this committee does not act and so I am hopeful that we can work together in a bipartisan way to give strength to a net neutrality provision that will protect those innovators all across the world and really make the Internet what it deserves to be, which is the most utilitarian thing we have ever come up with. Thank you.

MR. UPTON. Mr. Stearns.

MR. STEARNS. Thank you, Mr. Chairman. Let me commend you and the others for your long effort here in negotiation. I think after listening to Mr. Dingell, I think perhaps you should realize much like other markups around here, we get through the subcommittee markup, then we go to full committee and there are some changes done, and then it goes to the House and there are more changes, so oftentimes it is better to keep plodding forward and realize that the perfect is the enemy of the good here because in every instance when you talk about this bill, it comes down to perhaps three areas, the concern about build-out requirements and obviously there is language in is this bill that talks about how you can't discriminate, and I have the language in front of me. The other concern is the uniform rate requirement and, you know, really we as Republicans particularly are concerned about putting any regulation in there and let the competition decide. And the third area is net neutrality that was just recently mentioned. There is language I am looking for right in title II talking about enforcement of the FCC's

broadband policy dealing with net neutrality, so Mr. Upton and Mr. Barton have put language in there. So it is just a case of whether you think it is strong enough, and I think the best way to handle this is, after this hearing, I urge my colleagues to mark the bill up. There won't be complete agreement, but then we will be able to find and put something in the sand that says this is what we think is the best possibility, and then move from there to the full committee and have another markup where we can have amendments and discuss it and work it out.

I was involved with the write-up of the 1996 Telecom Act, and back then there possibly were about 37 million people that were online shortly after the bill was passed. Today we have 220 million Americans that are online so it has moved tremendously forward, and I think when you go with a bill this complex, it has a huge impact. We can see from the audience here, it is standing room only. There are people out in the hallway. This has huge financial impacts and I appreciate that any of the executives and the lobbyists that are involved here are worried about their clients, and I would say to ease their concern, is this process we had in the 1996 Telecom Act was the same way and we just moved forward. And so I urge my colleagues to hopefully mark this bill up shortly out of this subcommittee, Mr. Chairman, and move it to the full committee.

An area that I have concern about, even in the Telecom Act, was this interconnection. Obviously once these pipes are made open and the companies have them, they own them. The question is, should other people have the right to offer voice, video, and data applications over these and how do you work out that interconnection, and I think current law provides for rights and obligations for interconnection, but I am pleased that the draft attempts to include those rights going forward for VOIP providers given the recent FCC decision sand the ongoing debate concerning what constitutes an information service or telecom. I want to ensure that all parties have an opportunity to compete, and I want to also--my colleague, Mr. Boucher, has pointed out, both he and I have a bill that we thought should be part of this markup. So I thank you, Mr. Chairman.

MR. UPTON. Mr. Rush, co-author of the bill.

MR. RUSH. Thank you, Mr. Chairman. Mr. Chairman, I want to thank both you and Ranking Member Markey for conducting this very important hearing to allow for a full and fair and open discussion involving the legislation that I am sponsoring with Chairman Barton, yourself and Vice Chairman Pickering. I also would like to thank our distinguished panel of witnesses for taking the time out to share with us their insights on this legislation.

Mr. Chairman, this bill represents a huge step in bringing lower prices, more choices, and better services not only to my hard-pressed

constituents, but to the entire nation. Specifically, this bill would provide equitable competition among a variety of video service providers. Video service providers can compete in price, quality, and quantity, and consumers can finally decide which service provider they prefer.

In that respect, I want to ensure that my community, the African-American community, is better served. As you know, African-Americans watch more television; spend billions of dollars on television service, more than any other demographic group or ethnic group in the entire nation. Mr. Chairman, their concerns must be addressed. Specifically, this bill will create a nationwide approval process for pay TV services. By streamlining the system, these companies will be able to offer new television services in many areas while protecting local interests. Cable providers will be able to participate in the streamlined system once they face local competition. This bill would also prohibit discrimination on the basis of income and give the FCC the power to revoke the provider's franchise area if there is willful or repeated violation of discrimination. This bill will require video service providers to provide access to leased channels to qualified minority owners. This bill would also require Internet-based telephone services to offer 911 capabilities while ensuring Internet telephone providers that they have all the access to the necessary 911 infrastructure and technology that is available. This bill would clarify the FCC authority to prevent Internet service providers from blocking or degrading any content or application delivered over the public Internet. This bill would also preserve municipalities' rights to collect up to five percent from any pay TV provider, would allow cities and towns to develop their own broadband networks, which they are struggling and striving and most desirous of.

Mr. Chairman, there has been and will continue to be different opinions about this bill, and I urge this subcommittee and the full committee to move forward expeditiously with the markup, and I will also encourage my colleagues to stay focused on the central objective of this legislation which is to give those same consumers a more diversified voice in video. In 2003, the General Accounting Office found that cities with more than one cable provider enjoyed 15 percent lower rates than in cities with a single provider.

This legislation represents a huge step in helping our American consumer. It creates a fair and equitable marketplace that should allow competing companies to thrive and invest, and hopefully provide more jobs in the service areas and also across the nation. Mr. Chairman, thank you, and I yield back the balance of my time.

MR. UPTON. Thank you. Mr. Terry? Mr. Pickering.

MR. PICKERING. Mr. Chairman, thank you, and I want to commend you and Chairman Barton for your work on this effort. I want to thank

Mr. Markey and Mr. Dingell for the good-faith efforts that we engaged in in the best tradition of this committee in trying to reach an agreement, a bipartisan agreement on telecommunications. As we all know on this committee, it is our tradition to have a bipartisan approach on telecommunications and I still believe and hope that we can reach that, and I think you will see on both sides of the aisle as we move forward that there will be bipartisan support.

I would like to take a moment to put into context our effort in the legislation that is before us as we move forward. Understanding history gives us good insight into the present and into the future. If you look at the beginning of the discovery, Alexander Graham Bell's, he started the telephone and at that time you had AT&T start, you had many independent providers of telecommunications service but you had no interconnection policy. And because of no interconnection policy, you had multiple networks that could not operate, function, or talk to one another. As a result, in 1934 the natural monopoly theory was adopted by Congress and that existed up until the breakup of AT&T in 1984. One of the great legacies of Ronald Reagan was the collapse of the Iron Curtain and the freedom that came through that across Eastern Europe and the former Soviet Union. One thing that is not often mentioned with the Reagan legacy is the breakup of AT&T, which changed and started the process that we are still working on today, and that is to bring competition to telecommunications.

It is extremely significant that we get this right, and the reason is because the gains of our economy, the efficiency, the productivity that has really driven the last decade and a half of growth, really the last decade of growth, has come through the telecommunications sector. One of the most significant things, probably the best thing we did in the 1996 Act that no one disputes, which is a rare thing, is the removal of barriers to entry. We are continuing that today, and we also did in the 1996 Act is that we made sure that we preempted the States and local communities from blocking competitors in voice, and we set up a path to try to bring not only long distance competition enhanced but local voice competition. We hoped at that time that cable and telephone companies, facility-based providers as well as CLECs and others would then have a vibrant competitive opportunity. The reality is, ten years later we are just now beginning to see it, and this bill we hope will stimulate what we had hoped ten years ago and that would be that cable and telephone companies would actually compete against each other. Today we are seeing among our cable companies their emergence as voice over Internet providers and offering a bundle of services, both voice and video. What we did in this bill and the best thing that I believe we do in this bill, is that we complete what was started in 1996 and that we now

bring all telecommunications policy to the Federal level. When you are now talking about IP applications, it does not make sense to have a patchwork of thousands of localities in 50 States regulating video in a different way. This gives both for cable companies and for telephone companies national franchises and it significantly advances a Federal policy and will advance competition in the video marketplace. But equally important is that we maximize competition in the voice marketplace and we should not lose sight of that goal. Right now after ten years the local incumbent telephone companies, the Bell companies control about 95 percent of the local voice market. In the cable video market, you have 30 percent penetration through satellite, so in many ways the video market is more competitive than the voice market. This bill through interconnection cable directly to local telephone companies will help expedite, enhance, and promote voice competition, and I want to make sure, Mr. Chairman, that I work with you to make the commitment and to assure that the language that we now have in the bill achieves that objective of getting competitive parity to voice over Internet providers so that they can enter the voice market and compete effectively with the local telephone companies just as we remove barriers to entry in the video marketplace there should be parity. I want to make sure as we move forward today that we get net neutrality right. It is very critical that we have not only two choices, but we have and maintain hundreds of choices for consumers. But this is a good start. It is a good framework and I am very pleased to join Chairman Barton and Mr. Upton and Congressman Rush as we start this process of great significance, and I hope that at the end of the process that we can say on our side of the aisle that we have promoted and continue the Reagan legacy of more competition and free market competition for every sector, every market, and that we have maximized that intent. Thank you very much.

MR. UPTON. Mr. Gonzalez.

MR. GONZALEZ. Thank you very much, Mr. Chairman. I am going to be brief. I always believe there are certain topics or issues that this committee takes up at hearings. I think opening statements should really be opening prayers and so I will do my best, and I wrote something quickly. It will only take me a second, and that is, I hope this committee will guard against views and even biases formed in years past in the technological world that no longer exists, that we will view our concerns through the clear lens that reflects new technology, its impact on markets, yet that we will be guided by the enduring principles of fairness, robust competitiveness, and sound economic policies. Amen. I yield back.

MR. UPTON. Ms. Blackburn.

MRS. BLACKBURN. Thank you, Mr. Chairman. I want to thank you and Chairman Barton for all the work that you have put into producing this bill and working to reform our franchising laws and for holding this hearing today, and I am pleased to see, and I know that my constituents are pleased to see, that this bill incorporates some of the key concepts of the bill that I have worked on with Representative Wynn, the Video Choice Act.

This bill--and I tell you, Mr. Boucher and Mr. Bass were complaining about it being thin. I think thin bills are very good. Thin is a good thing. If we get less government regulating and got out of the way, innovation and job creation could take place. But it makes it clear that we must change video franchising. We must change the process because it does stifle competition and innovation. We have great panels today. We appreciate you all being here. I am looking forward to talking with you, and wish I could have all my time for questioning and everybody else's time. But the facts are clear that we do have to cut red tape and regulations and promote competition. The price consumers pay for long distance in their wireless minutes has gone down consistently in the last ten years, and at the same time cable costs have gone up 86 percent. That is four times the rate of the consumer price index. That has to be addressed. And we know that it is no surprise that the FCC has found that only 1.5 percent of the markets have head-to-head competition for cable services. Right now video choice is limited to a cable provider, satellite, rabbit ears, and Congress does need to take action on this bill. We know competition brings lower prices. You can look at the Keller Texas example, $37 a month, and almost overnight Chartered Communication cut the price in half.

Finally, I think it is important to note that this is not just about choices in video service, it is also about broadband. Chairman Barton mentioned that cutting the regulations that prevent the companies from entering the video market will help with both our broadband deployment and our broadband penetration here in the U.S., and as the Chairman said, we are now at 16th. That is not acceptable. And I just that just like the bill that Representative Wynn and I had co-authored, that this will improve that standing, so we look forward to having you with us and hearing from you, and Mr. Chairman, I yield back.

[The prepared statement of Hon. Marsha Blackburn follows:]

PREPARED STATEMENT OF THE HON. MARSHA BLACKBURN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Chairman Upton and Chairman Barton I want to thank you for your work in producing this bill to reform our franchising laws and for holding this hearing today. I am pleased to see, and I know all our constituents will be pleased to see that this bill

incorporates key concepts of the bill that I have been working on with Rep. Wynn, the Video Choice Act.

Our bill, and now the committee's bill, makes it clear that we must change the video franchising process that currently stifles both innovation and competition. We have two good panels today, but the facts are clear -- cutting red tape and regulations to promote competition helps consumers.

The price consumers pay for long distance or wireless minutes has gone down significantly in the last ten years, but the price they pay for cable has gone up 86% over that same period -- that is four times the rate of the Consumer Price Index. Why is this? Well it should be no surprise that the FCC has found that only 1.5% of markets have head-to-head competition for cable services. Right now video choice is limited to a cable provider, satellite service, or rabbit ears. Congress needs to act on this bill. We know competition lowers prices. Right now Verizon is offering its video package for about $37 dollars a month in Keller, TX. Almost overnight Charter Communications cut its price in half to compete.

Finally, it is important to note that this is not only about choices in video service. The pipes that deliver this video product will also have more space for data -- and cutting the regulations that prevent these companies from entering in the video market will only help broadband penetration in the US. The United States has fallen to 16th in the world in broadband penetration and I believe that like the bill I authored with Rep. Wynn, the chairman's bill will improve this standing.

The message is simple. Reducing the barriers to video competition is good for consumers. I want to commend you Mr. Chairman for your work and I look forward to the testimony.

MR. UPTON. Ms. Cubin.

MS. CUBIN. Thank you, Mr. Chairman. I do believe in the promise of Internet protocol technology and how it can improve and enrich American consumers, but I want to ensure mostly that any legislation that we consider does not harm those businesses who have made it their business, if you will, to serve the most remote subscribers in the country with telecommunications services. I represent the most rural state in America and we don't even have cell phone service in many, many places in our state. So I really want to protect the businesses who have made investments in rural America, but I also want to protect issues like access to content, preservation of the universal service fund, and the freedom to access the Internet in an unfettered manner, so those will be my guide in this deliberation. Thank you, Mr. Chairman.

[The prepared statement of Hon. Barbara Cubin follows:]

PREPARED STATEMENT OF THE HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Thank you, Mr. Chairman.

I want to thank you and those who have spent hours, weeks and months in negotiations to craft this bipartisan bill. We've come a long way from the start of this Congress when the idea of a national video franchise was first proposed, to the bill we are deliberating today. Thanks to the promise of Internet Protocol (IP)-enabled services and the deployment of fiber-optic infrastructure, however, we now find ourselves debating the novel concept of our constituents being able to receive video over their phone lines.

It wasn't too long ago when everyone was using dial-up connections to access the Internet and the concept of broadband in one's home seemed prohibitively expensive and remote. Fast forward 10 years – as the Internet has become mainstream and commercialized – and many consumers now have a choice of broadband providers. While we still have a ways to go before this benefit truly affects all of those in Wyoming's most rural communities, progress is being made. As a result of this broadband deployment, we are seeing intermodal competition and other new innovations no one could have foreseen. This is really to the benefit of consumers across America.

I believe in the promise of IP technology and how it can improve the rich selection of competitive services for consumers. I also want to ensure that any legislation we consider does not harm those who have made it their business to serve the most remote subscribers with advanced telecom services. Issues like access to content, preservation of the Universal Service Fund and the freedom to access the Internet in an unfettered manner will guide me as we proceed on this bill.

I look forward to hearing from both of our distinguished panels on this draft today and want to continue our dialog as we tackle legislation modernizing the telecommunications laws.

I yield back the balance of my time.

MR. UPTON. Thank you. Ms. Solis.

MS. SOLIS. Thank you, Mr. Chairman. I want to thank you for the opportunity to give an opening statement. As a member of the full committee, I have been following this issue very closely. Prior to my election to Congress, I served in the California State Senate on the Utilities and Commerce Committee and worked back then in 1996 on the Telecommunications Act. While the world of telecommunications has changed dramatically since then, some issues such as the digital divide and redlining remain a challenge to many in our low-income communities, the community that I represent in Los Angeles. That is why I strongly support inclusion of strong enforceable anti-discriminatory language in the committee bill. Non-discrimination in telecommunications is critical to bridging the digital divide, particularly in communities of color, especially the Hispanic community. While Latinos are the fastest growing demographic of online users, only one in eight Latino households has access to broadband services. Indeed, any reform must ensure that Latino communities get access to the latest broadband technologies as quickly as non-Latino communities. In fact, 11 members of the Congressional Hispanic Caucus and numerous civil rights organizations, consumer groups, and advocacy groups support strong enforceable anti-discrimination language in the video franchising agreements. Included in that is the leadership conference of the civil rights letters that we have received, the League of United Latin American Citizens, the National Hispanic Bar Association, the National Hispanic Caucus of State Legislators, the National Puerto Rican Coalition and the Hispanic Federation. I ask for unanimous consent to enter these letters from these groups into the record.

To be truly effective, any non-discriminatory broadband deployment provision adopted by this committee should carefully and specifically look at a method of enforcement, and some have suggested that the non-discrimination provision only applies to community self-selected for access to video services by new service providers. But such a policy, in my opinion, would actually encourage discrimination. Take, for instance, in Los Angeles. If such a policy would allow a video service provider to provide service only to residents in Brentwood while disenfranchising the rest of Los Angeles so long as a provider didn't discriminate within the boundaries of Brentwood, in effect video service providers could neglect service to low-income areas and the other parts of Los Angeles, for example, in the area I represent in East Los Angeles as well as South Central Los Angeles. I share my colleagues' goals of passing legislation which will promote increased competition, lower prices, improved quality of service and the development of new advanced services, but the digital divide remains a reality for my constituents and many others. We should not let this opportunity pass. And I am pleased to hear that the latest draft put forward by Chairman Barton and others includes a placemaker for anti-redlining enforcement.

I look forward to working with my colleagues on that and working out particular language that would hopefully phase in with some strong enforcement language so this is done over time. I yield back the balance of my time. Thank you.

[The information follows:]

Congress of the United States
House of Representatives
Washington, DC 20515

March 29, 2006

The Honorable Joe Barton
Chairman
Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable John D. Dingell
Ranking Member
Committee on Energy andCommerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Barton and Ranking Member Dingell:

We write to urge the House Committee on Energy and Commerce to redouble its efforts to produce bipartisan legislation addressing the issue of video franchising. Anything less could derail the chances of passing significant legislation promoting increased competition in the communications marketplace this year. In particular, we believe video franchising legislation must continue Congress' tradition on matters of communications policy of adopting meaningful non-discrimination provisions with strong enforcement mechanisms. The interests of low income and minority communities hang in the balance.

We are painfully aware of the regressive consequences should we fail to quickly close this nation's digital divide. Latinos disproportionately rely on over-the-air signals, as opposed to cable or satellite, for their television programming. Nielsen Media Research reports that 29 percent of Latino TV households in the U.S. receive their video programming over the air compared to only 16 percent of non-Latino households. Moreover, while Latinos are America's fastest growing demographic of Internet users, only one in eight Latino households has access to broadband services.

If we want to bridge the gap between technological "haves" and "have nots," the benefits of competition in the communications marketplace must be extended to as many Americans as possible, in as many local communities as possible, without regard to race, color, national origin, religion, sex or income. The current draft of legislation before the Committee does not guarantee this. First, the draft is silent in defining "franchise area," an omission that strikes at the heart of this proposal. The proposed anti-discrimination language only requires that where a cable or video service provider decides to offer services it not deny access based on income to potential subscribers in that self-selected area. The draft also allows any incumbent video service provider to opt in to the national franchise system established by the legislation, thereby freeing it from prior build-out obligations. Combined, these provisions in the draft could have a chilling effect on efforts to bridge the digital divide.

In our nation's capital, for example, this proposed policy would allow a new entrant to choose to provide video services only in Washington, D.C.'s Northwest area, and at the same time would release any incumbent service providers from prior timelines and obligations to build out or

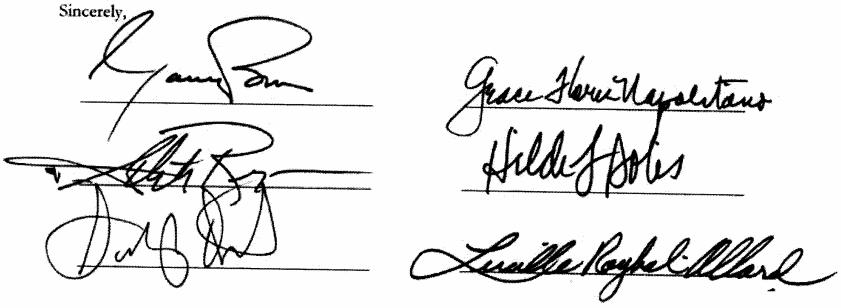
continue to serve Southeast D.C. As long as providers did not discriminate *within* Northwest D.C.—where both providers would likely sink investments and upgrades to compete head to head—the proposed policy would allow both the incumbent and the new entrants to disenfranchise the residents of the Southeast region. Such an approach would actually pervert civil rights principles, and neglect decades of non-discrimination protections.

As we move to update our communications laws, it is essential that there be no retreat from the principles of universal service and non-discrimination in America's telecommunications policy. In the 1992 Cable Act, Congress specified that each franchise applicant must "become capable of providing cable services to all households in the cable area" within a reasonable time period. Today, at a minimum, we should ensure that each resident within communities where new services are deployed has the opportunity to choose from multiple providers of new technologies and services as soon as reasonably possible. And to prevent discriminatory practices, the scope of coverage of any non-discrimination provisions for video franchising must encompass the entire footprint of a video service provider.

Finally, consumers should know that their telecommunications service provider and the oversight authority charged with protecting them and resolving disputes are locally accessible. It should not be acceptable for consumer grievances or claims of discriminatory practices to be tied up for months in a national bureaucracy. Local governments, especially with respect to the offering of video services, have historically served as the front line against discrimination in their communities. Before we abandon that line of defense against discrimination, Congress should ensure that in doing so it builds upon, rather than retreats from, this record of protection.

We thank you for your continued leadership and look forward to joining you in support of bipartisan legislation promoting robust competition in the communications marketplace.

Sincerely,





National Puerto Rican Coalition, Inc.®

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Suite 802
Washington, DC 20036
202.223.3915
fax: 202.429.2223
e-mail: nprc@nprcinc.org
website: www.bateylink.org

February 6, 2006

Honorable Ted Stevens
Member of the U.S. Senate
Chairman

and

Honorable Daniel K. Inouye
Member of the U.S. Senate
Co-Chairman

United States Senate
Committee on Commerce, Science & Transportation
Washington, D.C. 20510

Dear Senators,

I am writing to you concerning the Full Committee Hearing on Video Franchising which is scheduled for February 15, 2006. The National Puerto Rican Coalition would also like the opportunity to testify on this matter in order to address the impact of the proposed changes to Cable TV/Video Franchising regulations on the Hispanic Community.

Today 40 million Americans have high speed access to the Internet, yet the most recent data shows that the digital divide continues to limit access for 27% of all Latinos. This technology gap threatens the advancement of a major segment of the population, the largest minority and fastest growing segment of the population, Americans of Hispanic descent.

As we move further into the Internet Age, access to technology is becoming a critical tool for success in American society. This means that the decisions that Congress is currently making to modernize the nation's telecommunications laws and regulatory systems will determine whether marginalized communities will remain on the wrong side of the Digital Divide.

Our national policies must ensure that new technologies will become available as they are developed and that their benefits will reach all segments of our society -- those that are already plugged into the Internet, as well as those that today do not even have access to a computer.

Congress is considering how our system for licensing subscription video services should be managed, and how to ensure that new regulations will improve services, diversify programming, create increased competition and promote affordability. The additional competition that will come from any new entrant -- be it the telephone companies or anyone else -- to the TV video cable marketplace will

If we really believe in the benefits of competition, we should believe in it for everyone and every neighborhood. An anti-redlining provision confined to the contours of wealthy communities that are most likely to receive these new services would be meaningless. In short, any legislation should ensure that Hispanic neighborhoods get advanced digital services as quickly as non-Hispanic neighborhoods.

We look forward to the opportunity of working with you and the other members of the Committee regarding the issue of video franchising. Should you have any questions regarding our position your staff may contact me or NPRC's Legislative Director, Ms. Kery Nuñez at 202-223-3925 Ext. 303.

Sincerely,

Manuel Mirabal
President & CEO
National Puerto Rican Coalition
and
Founder
Hispanic Technology & Telecommunications Partnership, HTTP

Copy To:

Sen. John McCain - Arizona
Sen. Conrad Burns - Montana
Sen. Trent Lott - Mississippi
Sen. Kay Bailey Hutchison - Texas
Sen. Olympia Snowe - Maine
Sen. Gordon Smith - Oregon
Sen. John Ensign - Nevada
Sen. George Allen - Virginia
Sen. John Sununu - New Hampshire
Sen. Jim DeMint - South Carolina
Sen. David Vitter - Louisiana
Sen. John D. Rockefeller IV - West Virginia
Sen. John F. Kerry - Massachusetts
Sen. Byron L. Dorgan - North Dakota
Sen. Barbara Boxer - California
Sen. Bill Nelson - Florida
Sen. Maria Cantwell - Washington
Sen. Frank Lautenberg - New Jersey
Sen. E. Benjamin Nelson - Nebraska
Sen. Mark Pryor - Arkansas



...a human services organization

March 30, 2006

The Honorable Joe Barton
Chairman
Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Hon. John D. Dingell
Ranking Member
Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Barton and Ranking Member Dingell:

I am writing to support the House Committee on Energy and Commerce adoption of meaningful and enforceable non-discrimination provisions on video franchising legislation.

The Cuban American National Council believes it is in the interest of all consumers particularly those affected by the digital divide that all Federal regulations apply to the Telecomm and Cable providers equally, including anti-redlining, EEOC, and other non-redundant anti-discrimination laws.

Both Cable and Telecom providers must service all neighborhoods in a given area according to a reasonably set time table with no exceptions to either rural or urban communities.

A United Way Supported Agency

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Accordingly, any non-discrimination broadband deployment provision must define both the scope and methods of enforcement. These regulations should apply to both new and existing providers in all communities covered.

May I thank you in advance for your efforts on behalf of accessible universal service regardless of area, income, or other business related considerations.

Sincerely,

Guarione M. Diaz
President and CEO

cc: Hon. Xavier Becerra
California 31st District
Member of Congress

Hon. Hilda L. Solis
California 32nd District
Member of Congress

To strengthen and promote cities as centers of opportunity, leadership, and governance.

National League of Cities

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Executive Director
Donald J. Borut

March 22, 2006

The Honorable Hilda L. Solis
1725 Longworth House Office Building
Independence and New Jersey Avenues, SE
Washington, DC 20515

Dear Congresswoman Solis:

On behalf of the National League of Cities (NLC) and the Hispanic Elected and Local Officials (HELO) constituency group at the National League of Cities, we thank you for your recent correspondence to House Committee on Energy and Commerce Chairman Joe Barton and Ranking Member John D. Dingell urging that the Committee's video franchising reform bill include enforceable provisions to prohibit the deployment of broadband in a discriminatory manner. Both NLC and HELO share your concerns regarding the possible unwelcome effects that a rewrite of the telecommunication and video franchise laws would have upon the Hispanic community.

Local communities across the nation support and encourage competition in video, telephone, and broadband services. NLC and HELO support competition, which leads to the delivery of better products and prices to residents and businesses. However, we oppose any legislation that would limit the role of local governments with respect to the franchising of video service providers that use city rights-of-way. This is because the protection of our citizens, local businesses, local infrastructure, and local economies cannot be abandoned during the pursuit of competition.

As you recognize, each community is unique, and local elected leaders are in the best position to ensure that each community's needs are met through the franchising process. Through the local franchise, officials are best able to ensure that providers meet the community's needs and interests and are not allowed to choose who gets service and who does not.

Currently, franchising authorities have the ability to specify "build-out" requirements for video providers. Through this mechanism, local elected leaders promote the fair and equitable treatment of all people so that race, ethnicity, and income do not become mechanisms for economic "redlining," the practice of bypassing less profitable neighborhoods.

In addition to preventing the "cherry picking" of lucrative markets, local elected officials also maintain social obligations of providers by negotiating for community public, educational, and governmental access (PEG) channels in franchise

agreements. Local government's ability to maintain and enforce build-out as well as provide access to public channels ensures that video services are provided to the whole community.

We appreciate your willingness to put these important roles of local government at the forefront of the discussions regarding deployment of broadband in a nondiscriminatory manner. The staff at NLC—as well as local government representatives nationwide—stand ready to work with you on this important matter.

Sincerely,

Joseph Maestas, Mayor
Española, New Mexico
President, Hispanic Elected Local Officials,
National League of Cities

Donald J. Borut
Executive Director
National League of Cities



December 7, 2005

Chairman Ted Stevens
Co-Chairman Daniel K. Inouye
U.S. Senate Committee on Commerce,
Science, and Transportation
508 Dirksen Senate Office Building
Washington, DC 20510

Chairman Joe Barton
Ranking Member John D. Dingell
U.S. House Committee on Energy
and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Stevens, Co-Chairman Inouye, Chairman Barton, and
Ranking Member Dingell:

On behalf of the Hispanic Federation ("HF"), I am writing to you to convey our strong concerns regarding H.R. 3146 and S. 1349, also known as the "Video Choice Act of 2005," and any other proposals to eliminate the essential anti-discrimination provisions that prevent video service providers from choosing to serve only high-income neighborhoods. In our view, this legislation would actually result in a widening of the digital divide — leaving many Hispanic and traditionally underserved communities out in the cold when it comes to video competition.

Founded in 1990, HF's mission is to better meet the growing needs of the Hispanic community by developing and supporting institutions that advance the quality of life for Latinos. Our initiatives are tools for Hispanic nonprofits that provide necessary services to Latinos in need and our services have touched the lives of millions of Hispanics.

We believe that the anti-discrimination provisions in the Cable Acts of 1984 and 1992 are critical to ensuring that members of the Hispanic community have fair access to the latest technology. The law required cable companies to build out their networks to serve everyone in their region in a reasonable period of time, regardless of socioeconomic status. There are obvious benefits to these provisions and any company hoping to enter into this market should be held accountable to the same standards as their competitors.

The argument that it takes too much time to negotiate franchise agreements with local governments is dismissed by the numerous franchise agreements already obtained by telephone companies in localities across the country. We fear that many of the complaints mask the true intent of supporting a repeal of the anti-discrimination rules — namely, to roll out new broadband and video services solely to customers that have the luxury of paying for their most expensive services.

We support competition but believe it must benefit all groups, including poor, urban and ethnic communities. We know that greater and nondiscriminatory access to video competition will certainly benefit the Hispanic community. It is therefore critical that Hispanic neighborhoods have access to the latest technology and telecommunications services.

These views are shared by other Latino advocacy organizations that have led the way in protecting the civil rights of Hispanics. For example, the National Hispanic Caucus of State Legislators ("NHCSL") recently passed a resolution urging Congress to create "a national broadband policy that provides a legislative and regulatory framework for the rapid, non-discriminatory deployment of video" services. NHCSL further called on Congress to "apply the same Federal prohibition of discrimination that currently applies with respect to cable to new competitors as well." HF could not agree more with these principles and any changes to the telecom laws should comply with NHCSL's non-discrimination test. To do otherwise would disenfranchise large segments of the Hispanic community.

We therefore urge you to oppose any legislation that would be a setback for competition and the closing of the digital divide in the Hispanic communities.

Sincerely,

Lillian Rodriguez-Lopez
President

HISPANIC NATIONAL BAR ASSOCIATION

The National Voice of the Hispanic Legal Community.

March 29, 2006

The Honorable Joe Barton
Chairman
Committee on Energy and Commerce
2125 Rayburn HOB
Washington, DC 20515

The Honorable John D. Dingell
Ranking Member
Committee on Energy and Commerce
2322 Rayburn HOB
Washington, DC 20515

Dear Chairman Barton and Ranking Member Dingell:

On behalf of the Hispanic National Bar Association ("HNBA"), we commend you for your leadership and vision in drafting legislation that will promote competition in the communications marketplace. We view increased competition and expanded telecommunication services as paramount to the success of Hispanics in the United States, and we want to ensure that the benefits of increased competition are extended to as many Americans as possible, without regard to the race, color, national origin, or income of the residents in a community. Thus, we urge you to safeguard the long-standing anti-discrimination rules that have protected Hispanic communities from digital redlining for over twenty years. As you consider revisions to the telecommunications laws, we believe that the anti-discrimination provisions must be retained to ensure that Hispanic and other underserved communities have an equal opportunity to benefit from the technologies that will lead our country forward in the digital era.

Founded in 1972, HBNA represents the interests of over 27,000 Hispanic American attorneys, judges, law professors, and law students in the United States and Puerto Rico. HBNA is a member of the National Hispanic Leadership Agenda, and works to address issues of concern to the national Hispanic community. In our view, the anti-redlining provisions of the federal cable laws are critical to ensuring that members of the Hispanic community have fair and equal access to the latest technology.

The Communications Act of 1934, as amended, makes it clear that all cable operators are bound by federal nondiscrimination rules under which they may not deny access to video service to any group of subscribers within a franchise area "because of the income of the residents of the local area in which such group resides." 47 U.S.C. § 541(a)(3). The Cable Communications Policy Act of 1984 ("1984 Cable Act"), the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), and the Telecommunications Act of 1996 ("1996 Cable Act") combine to create an unambiguous and unwavering national policy that prohibits redlining by any cable operator, whether it is an established cable company or a new entrant like AT&T or Verizon.

As you know, the 1984 Cable Act created a framework under which local franchising authorities ("LFAs") were explicitly required to ensure that cable franchisees did not redline, and most LFAs incorporated strong anti-discrimination rules directly into their franchise agreements. In the 1992 Cable Act, Congress decided that LFAs could not grant an exclusive franchise and could not unreasonably refuse to award other competitive franchises. In addition, Congress added a requirement

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that each franchise applicant must "become capable of providing cable services to all households in the cable area" within a reasonable time period. 47 U.S.C. § 541(a)(4)(A). In 1996, Congress amended the Communications Act again specifically to allow the telephone companies to enter into the video marketplace; to the extent they do not do so as common carriers, via wireless, or as Open Video Systems, they are required to do so as cable operators, subject to the rules just described. 47 U.S.C. § 571(a).

In short, for more than a decade, the door has been wide open to companies to enter the video marketplace, and with limited exceptions telephone companies have chosen not to do so. Now that they appear ready to enter the market, they recognize that the anti-redlining provision in federal law, in conjunction with local franchising rules, require them to offer services to all residents in their service area within a reasonable period of time.

Many telephone companies are not prepared to make such a commitment and therefore have turned to Congress to excuse them from the anti-discrimination rules that would ensure that all residents, regardless of income, will have equal opportunity to benefit from their new services. Were the telephone companies given permission to bypass communities, many Hispanic residents are likely to be left behind, thereby widening the digital divide that exists in America today.

We support video competition and believe it essential that all competitors abide by current law to ensure that all communities receive the benefits of competition. As the Committee hearings on franchising begin, we urge you to oppose any legislation to eviscerate the anti-discrimination rules that have protected Hispanic communities for decades.

We thank you for your attention and consideration of the points that we raise in this letter. I may be reached through our national office, or directly at (516) 621-8646, nelson.castillo@caslawfirm.com.

Sincerely,

Nelson A. Castillo

Nelson A. Castillo, Esq.
HNBA National President

cc: Committee on Energy and Commerce
HNBA Board of Governors

The Miami Herald

Posted on Thu, Jan. 05, 2006

TECHNOLOGY

Help Hispanics get access to broadband, video choices

BY HECTOR M. FLORES

www.lulac.org

In 2006, Congress will set out to rewrite the nation's telecommunications laws. And if federal lawmakers get it right, Hispanic Americans, and consumers generally, could have much to celebrate. But if lawmakers misfire, the digital divide could explode into a digital abyss.

Technologically, we are now at the point where at least two companies are likely to be competing in your community to offer you the "triple play" of television, telephone and high-speed Internet services. There are outdated rules that stand in the way of phone companies providing cable services, and of cable companies providing phone services. Congress should find ways to remove those barriers, but Congress must also preserve those rules to ensure that this great new competition is available to everyone, and not just the wealthy.

Various existing government requirements on telecommunications providers are not only unnecessary but counterproductive. We need to streamline or otherwise eliminate unnecessary red-tape imposed by state and local governments in deciding whether an otherwise qualified company should be permitted to get into the phone or cable business. "Mother, may I" is truly bad policy in this technologically dynamic era.

But that is not to say that there is no role for government in ensuring that important social goals are met. For example, any company that wants to compete in the voice-telephone business should be required to contribute to the Universal Service Fund (to ensure affordable phone service in remote and low-income areas), to offer emergency 9-1-1 services and to offer services for the hearing impaired such as Telephone Relay Service. There is reason for concern, as many companies that offer Voice over Internet Protocol (VoIP) services are trying to evade these obligations. These requirements apply to incumbent phone companies, and they should apply to new competitors as well.

Similarly, companies willing and able to accelerate the expansion of broadband and video choice and to deploy alternative types of technology to provide more options for relevant content to the Hispanic community should do so in a nondiscriminatory manner. As

Congress considers updating our nation's telecom laws, it should do so by creating a national broadband policy with a legislative and regulatory framework for the rapid, nondiscriminatory deployment of video services to every neighborhood to ensure that the process is competitive and fair. In short, any reform must ensure that Hispanic neighborhoods get access to these new services as quickly as non-Hispanic neighborhoods.

Streamlining the franchising process, while keeping in place the federal prohibition of discrimination that currently applies with respect to cable for new competitors, will help spur competition and ensure that broadband networks are widely deployed to the widest possible geographic area.

For Hispanics the stakes are especially significant because only one in eight are experiencing the digital fast lane known as broadband. And study after study shows that broadband usage is a predictor of educational advancement and educational attainment.

We all stand to benefit most from the innovative services and lower prices that competition will bring. Yet, we want the big telephone and cable companies to duke it out for our business -- for everyone's business. That is not too much to ask as the fastest growing demographic of Internet users.

Hector M. Flores is president of the League of United Latin America Citizens, the largest and oldest Hispanic organization in the United States.

MANA®
A National Latina Organization
Founded by Mexican American Woman in 1974

March 28, 2006

The Honorable Joe Barton
Chairman, Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable John D. Dingell
Ranking Member, Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Barton and Ranking Member Dingell:

On behalf of the membership of MANA, A National Latina Organization (MANA), I am writing to urge the House Committee on Energy and Commerce to adopt meaningful and enforceable non-discrimination provisions as part of any legislation on video franchising considered by this Committee. Strong rules that prohibit discriminatory practices in the deployment of video services are essential to narrowing the digital divide. Inclusion of such provisions within any legislation will help ensure its bipartisan success.

Although recent studies indicate that Latinos are going on-line as much as non-Latinos for the first time in our history, only one in eight Latino households have broadband services. When the phrase "information is power" was coined it could not possibly have considered the exponential developments in telecommunications. The speed in which development is proceeding also forecasts that communities that are left out will be marginalized at a rate impossible to overcome.

It is imperative that entrants in the video market be required to bring their broadband services within their service footprint to all communities regardless of an area's income, within a reasonable time period.
Only this way can we ensure that Latino communities are offered equal opportunity to the latest broadband technologies just as quickly as non-Latino communities. A non-discrimination provision that applies solely to communities self-selected by large telecom carriers would actually invite discrimination in virtually every community not self-selected by those carriers.

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www.hermana.org

Congress can and must pass legislation that will reform the process without breaching bipartisan non-discrimination provisions which have been in place for nearly 20 years, and which serve as the only meaningful national broadband policy in place today. Clearly, video franchising legislation without enforceable anti-discrimination provisions will set our communities back decades in an age of information technology and global competition. Our country cannot afford for anyone to be left behind in this access to knowledge, least of all Hispanic Americans who are not only the largest minority population in the country but one which will comprise a major part of the workforce in decades to come. If one of us is left behind, all of us will behind.

Our grassroots chapter membership and affiliates from California to Florida and from Michigan to Texas ask for your help and thank you for helping ensure that this generation and future generations of Latinas and their families will know that their opportunities for advancement will not be at risk because we allowed legislation that curtailed their access to information.

Sincerely,

Alma Morales Riojas

Alma Morales Riojas
President and CEO
MANA, A National Latina Organization

cc: Rep. Fred Upton, Chair, Subcommittee on Telecommunications

Rep. Ed Markey, Ranking Member, Subcommittee on Telecommunications and the Internet

Rep. Chris Pickering, Vice Chair, Subcommittee on Telecommunications and the Internet

Executive Committee
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Assemblyman Felix W. Ortiz, NY
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National Hispanic Caucus of State Legislators

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RJRA
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SBC Southwest
Susan Gonzales
Comcast Corporation
Cher Gonzalez
Schering-Plough Federal Affairs, Inc.
Holly Jacques
Merck & Co., Inc.
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Novartis Pharmaceuticals Corporation
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NCTA
Gaspar Lucia
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Laura Lane
Time Warner, Inc.
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Ford Motor Company Fund
José Luis Rodriguez
HITN
Jim Ruda
Intuit
Marc Scarbrough
Pfizer, Inc.
Jose Sosa
Johnson & Johnson
Michael S. Van Leesten
Muckleshoot Tribal Nation
David Wellikson
AOL, Inc

February 15, 2006

Dear Chairman Stevens and Co-Chairman Inouye:

As President of the National Hispanic Caucus of State Legislators (NHCSL), I am writing to advise you of a resolution adopted by our organization last fall. NHCSL called on Congress to "update our nation's telecom laws by creating a national broadband policy that provides a legislative and regulatory framework for the rapid, non-discriminatory deployment of video choice." While NHCSL strongly supports video competition, we believe it is critical that the nondiscrimination provisions of current telecommunication laws be preserved in order to ensure that consumer protections are not weakened, and that the Hispanic community will benefit from this competition. This framework should apply to both the cable and phone industry as they compete for customers. Attached is a copy of our Resolution.

NHCSL is an organization of over 300 elected Hispanic state legislators from the United States, Puerto Rico, and the Virgin Islands. Our members lead the fight for better resources, housing, education, healthcare, and business opportunities for all Hispanic Americans. We are advocating that Hispanic communities have fair access to the latest telecommunications technologies.

NHCSL members from the east to west coast are witnessing the efforts to pass legislation at the state levels that would remove anti-redlining provisions from Cable TV franchise laws. Our members are well aware that the current debate over the nation's telecommunications laws has in many ways become a battle between competing industry interests. Yet, those most affected by the outcome will be individuals and businesses – particularly small businesses.

We are not interested in picking sides in the debate over franchise rules and encourage Congress to support rules that promote competition. However, the deployment of video and broadband services should be done by both the cable and phone companies in a non-discriminatory manner that serves every neighborhood in each service area in a reasonable period of time. In doing so, our communities will receive the benefits of both competition and the latest in broadband technologies.

While we support and agree that the new legislation would ultimately create more choice for consumers, we also firmly believe that this should not come at the price of loosing adequate anti-redlining consumer protections. Clearly, the Congress can accomplish the goal of clearing the way for increased Cable TV competition without weakening consumer and anti-redlining protection standards.

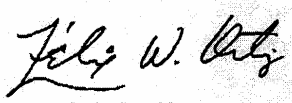
444 North Capitol Street, NW, Suite 404
Washington, DC 20001
Phone: 202-434-8070
Fax: 202-434-8072
www.nhcsl.org

The federal government created a national policy against redlining to assure access to cable services for everyone in every community regardless of their economic status. These policies reaffirm our values, guarantee equity, and are necessary for consumers; especially for low-income consumers who are often poorly informed and ill equipped to protect themselves.

I therefore urge you to ensure that any federal telecom legislation retain the provisions that have long protected vulnerable communities from discrimination.

Please feel free to contact me if you wish to discuss this issue further. Thank you for your time and consideration.

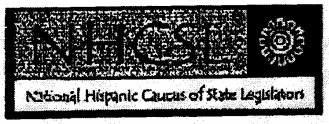
Sincerely,



Felix W. Ortiz, President
National Hispanic Caucus of State Legislators

Copy to:
Sen. John McCain – Arizona
Sen. Conrad Burns – Montana
Sen. Trent Lott – Mississippi
Sen. Kay Bailey Hutchison – Texas
Sen. Olympia Snowe – Maine
Sen. Gordon Smith – Oregon
Sen. John Ensign – Nevada
Sen. George Allen – Virginia
Sen. John Sununu – New Hampshire
Sen. Jim DeMint – South Carolina
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Sen. John D. Rockefeller IV – West Virginia
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Sen. Byron L. Dorgan – North Dakota
Sen. Barbara Boxer – California
Sen. Bill Nelson – Florida
Sen. Maria Cantwell – Washington
Sen. Frank Lautenberg – New Jersey
Sen. E. Benjamin Nelson – Nebraska
Sen. Mark Pryor – Arkansas

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NHCSL Supports Video Choice and Competition in the Hispanic Community

WHEREAS, NHCSL recognizes that the Hispanic population is a growth segment for the broadband communications market; and

WHEREAS, NHCSL strongly advocates for the increase of Hispanic-oriented programming, and non-discriminatory access to that programming, in all facets of the media; and

WHEREAS, programming should provide, to as wide an audience as possible, a positive and accurate portrayal of the cultural breadth of Hispanic and their contributions to the United States, one that recognizes and celebrates the diversity of the Hispanic population and culture; and

WHEREAS, NHCSL advocates for accessibility and affordability of technology and telecommunications services in Hispanic communities; and

WHEREAS, Hispanic neighborhoods need access to the latest technology and telecommunication services on a reasonable and timely basis and updating our nation's telecommunications laws will help bring these benefits to as many consumers as quickly as possible;

WHEREAS, NHCSL advocates for greater and non-discriminatory access to video competition, in view of the fact that it provides more options for relevant content to our community; and

WHEREAS, non-discriminatory access to culturally relevant content, and affordability of new technologies, are good for the marketplace and needed for Hispanic communities; and

WHEREAS, the 109th Congress is currently considering updating our nation's telecom laws; and

WHEREAS, NHCSL supports the acceleration of the expansion of broadband and video choice, given that it will increase consumer choice in Hispanic communities, thereby increasing diverse programming, accessibility and affordability to emerging technologies in the video marketplace.

NOW THEREFORE, BE IT RESOLVED, NHCSL urges Congress to update our nation's telecom laws by creating a national broadband policy that provides a legislative and regulatory framework for the rapid, non-discriminatory deployment of video choice, ensuring the benefits of competition in the video marketplace for the Hispanic community.

BE IT RESOLVED, that the National Hispanic Caucus of State Legislators calls upon legislators and regulators at both the federal and state level to work cooperatively to review definitions, terms and conditions to promote consumers' choice of similar services delivered through different mediums; and

BE IT FURTHER RESOLVED, that any new legislation enacted by Congress should apply the same Federal prohibition of discrimination that currently applies with respect to cable to new competitors as well; and

BE IT FURTHER RESOLVED, that any new legislation enacted by Congress should expedite and simplify the approval process for providers seeking authority to offer video programming services.

Adopted this 12th day of November 2005 at the National Hispanic Caucus of State Legislators' Executive Committee & BBA meeting held in Tampa, Florida.

Félix W. Ortiz

Assemblyman Felix W. Ortiz, NY
NHCSL President

MR. UPTON. Thank you. I would recognize Mr. Buyer, a very active Member on this issue, and I might ask Mr. Buyer, since I am the only one that hasn't voted on this, maybe if you would assume the chair here. You voted, right? Did you vote on this? We have got about seven minutes to go so--

MR. BUYER. I want to thank Howard here, because you have gone through the gamut. Last summer in Indiana I held two telecommunications forums, you can call them, with industry leaders last summer and last fall. Through those meetings we were able to come to agreement on principles which is extremely important, which is really challenging to do. Get everyone in this room to agree to a set of principles. Those principles are--whatever changes we made, we wanted to ensure economic security, encourage investment. We want to open markets, be deregulatory, regulate on parity. We want to empower consumers and be technology neutral. Those are all the principles which individuals had agreed to.

I then began the process of drafting legislation. Chairman Barton, Chairman Upton did not want me to do that at all. Well, I was not a very happy camper. I then met with Governor Mitch Daniels, asked Governor Daniels, what are you going to do about telecommunications reform,

Mitch. He said well, Steve, what do you want it to look like. Now, that is an opportunity. So I sat down with the Governor of Indiana. I happen to have a State Senator who also works on my Congressional staff. That is a good thing, because Senator Brandt Hershman then took that legislation and we even went a step further, and in Indiana today on a bipartisan basis, by overwhelming votes, we have the most sweeping telecommunications reform in the country, and we completely deregulated phone. It is exciting. So I am pleased about the road that we have gone. It has been challenging through BITS I, BITS II, the third draft, now onto the fourth draft. We are still not there yet. We are getting closer. But there are a couple words out there that get thrown around that I don't think I completely understand.

If I were to do an exercise and ask all of colleagues and everyone here to write on a piece of paper what does net neutrality mean, how many different definitions do you think we are going to get? A lot. I love how people throw out terms and use words but what do they mean? Well, my concern is right now with the present legislation and I have now back from legislative counsel my own legislation and I am going to hold on to it, but I am concerned about the use of the term "cable services." And I understand that for drafting purposes, it is easier to use existing language in the Communications Act, but I believe that the use of the term "cable services" does not signify the new era of video providers. So this is more than just semantics. I am also concerned about the exclusion of satellite from any forward-looking video programming legislation. I do not favor the exclusion of satellite. This should be called video services and satellites should be included in this. And while the current structure might not support the development of satellite into the local franchising regime, we have an opportunity to create a new structure that treats everyone alike. I am also concerned that the existing cable providers cannot obtain a national franchise for a local franchise until a new entrant enters the marketplace. I believe this is in direct opposition to treating like services alike, and if we are going to support the creation of this new structure, then it should embrace all providers of all like services at the same time. I am also concerned about the definition of gross revenues. I also have concern about statewide franchises that are out there right now. We need to include in this bill grandfathering the choice of States to either go with what they have got or opt in.

With regard to municipal provisions of services, I have a strong concern out there that some of these cities and towns are getting into the business without realizing what they are getting themselves in to, or how also that competitor is going to respond and how then the taxpayer is left holding the bag, and I have some strong concerns about that. So maybe

if we can include something that has a right of first refusal to an incumbent broadband video provider, perhaps that should be included in the bill.

I want to thank all of you for coming to provide your testimony today, and you have got to love the legislative process.

MR. BUYER. [Presiding] With that, the committee will be in recess temporarily for about six minutes.

[Recess.]

MR. UPTON. Okay. We are finished with the opening statements. Again, all Members will be able to put their statements into the record.

[Additional statements submitted for the record follows:]

PREPARED STATEMENT OF THE HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, I appreciate the work that you and your staff have put into this draft, but I'm disappointed that this bill fails to deal with several critical issues, particularly the need for strong "Network Neutrality" rules to protect consumers and preserve the open Internet.

I understand and I support efforts to create more competition in both the video and broadband markets. We should applaud efforts by cable and others to provide alternatives to Bell telephone service, and we should do everything we can to encourage the Bell companies to build out their networks to compete against Cable TV.

But the end result of this new "IP-based" world can't be a newly reconstituted AT&T duking it out with the big cable companies. In order to ensure vigorous competition and innovation we need to make sure that other entrants have a fighting chance.

And I think the legislation before us falls short.

Congress should provide appropriate rules and policies for new IP video offerings, and ensure that the Bell companies have the appropriate incentives and regulatory environment to enter into competition with cable.

But we shouldn't do this at any cost; Bell entry into video is not the ultimate goal, but rather a means to a much more important outcome.

The most important feature of the Internet and IP-based technology is the potential to provide any form of communication or content – voice, video, movies, music, messaging, etc. – over a single network.

This means that through a single Internet connection – regardless of who the access provider is – consumers and businesses should be able to receive almost any information, entertainment, or commercial content.

We have to ensure that the diversity of content and sources of information that we have on the Internet today does not get locked down as the Internet converges with the more traditional cable and telephone networks.

I'm concerned that the bill before us does not provide sufficient protections for this diversity and appropriate "Net Neutrality" rules to prevent vertical integration of Internet access and content. In fact, this legislation is worse than doing nothing – it prohibits the FCC from doing anything other than preventing complete blocking of unaffiliated content.

We all support the possibility of additional consumer choices and competition among broadband providers, but I believe that as we consider new regulatory "rules of

the road" for broadband providers we should not enable them to stifle competition in the provision of Internet content, applications, and services.

For the foreseeable future, the cable and phone companies will serve as a "chokepoint" for Internet access for the vast majority of Americans, and I believe it's incumbent on this Committee and Congress to ensure that the non-discriminatory framework that has allowed both the Internet to thrive, and competition on the Web to flourish, is preserved.

Without meaningful, enforceable "Net Neutrality" rules, we will be enabling network operators to fundamentally change the open nature of the Internet, allowing them to become gatekeepers for Internet users' access to content.

The major telephone companies have made it clear that they intend to establish "toll roads" on the Information Superhighway, making premium service levels available only for their preferred content.

The Bell companies' plans for "tiering" of Internet service would fundamentally change the way the Internet has always operated – openly and without barriers to content. There can be arguments about whether this system is fair or necessary, but it's difficult to dispute that this will fundamentally change the Internet and the experiences of Internet users.

I'm also very disappointed that the bill fails to institute any requirements for new video franchises to provide service throughout the franchise.

Without such obligations, and without local governments able to exercise any authority over these franchises, new video providers will almost certainly gravitate toward the most lucrative – and often the most wealthy – portions of the service area. They will have no responsibility to expand service to <u>all</u> consumers, and local governments will be powerless to prevent the "cream skimming" that will likely follow.

This Committee must carefully consider these important issues, and I hope develop a more balanced and more reasonable approach. There is too much at stake to get this wrong.

PREPARED STATEMENT OF THE HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. Chairman, although I am not currently a member of this Subcommittee, as a former member, I want to thank you for allowing me to submit this statement in writing, to be included in the hearing record.

America needs legislation to modernize our telecommunications laws, and this draft proposal is an important first step. This has been a long, on again, off again negotiating process. I wish we were marching together now, and I hope we will be soon in the near future.

We all want competition, and the authors' deserve praise for their hard work in that direction. Even though it is not a fully bipartisan draft, it represents good policy in several areas.

Most importantly, the bill will spur new competition into the video market nationwide, and it protects the ability of cities to offer wireless broadband in neighborhoods. It also applies 911 and E911 requirements to VOIP service.

I do however, have several concerns at this early stage, and I hope we can work on these issues:

- I am worried that low-income areas with cable service because of previous cable build-out requirements might lose cable service altogether in an era without these requirements for anyone. Perhaps we should guard against this with a "hold harmless" provision.

- We also should spell out the standard for the anti-income discrimination provision for national franchises--what would be a violation and how would we enforce against potential violations. Uncertainly leads to litigation. It feels like income discrimination if price cuts in high income areas with competition come only at the expense of price hikes in low income areas without competition.
- Given the current digital divide between communities, is there something else proactive we can and should do to bring the benefit of competition to all types of communities that won't deter competition in the first place?
- Franchise revenue in the City of Houston and nearby cities supports police and fire department budgets. I think we should know whether the new calculation of gross revenues will cause life-supporting local revenues do go up or down or stay the same.
- It is extremely important for cities to maintain control over their rights-of-way for beneficial public purposes like road and sewer projects, and perhaps we need to strengthen that control in these positive areas.
- I am also curious whether a state can be a "local franchise authority" under the bill, and if that make sense for a state as large as Texas. For thing, that would mean that the State PUC would be the only option for consumer protection for millions of people, rather than their localities.
- Finally, in what could be the biggest question of all, we may need to update the definitions of the Title II of the Communications Act for "cable service" and "video programming" since new kinds of Internet video could soon allow cable, telecom, or any other company a loophole out of national franchises. Under this bill, a company may be able install fiber in public rights of way in order to sell VOIP service, broadband Internet service, and video products and avoid this Act, creating a scenario with different regulatory regimes, just as the old 1996 Act did.

I am confident that we can come to satisfactory understandings on these and other issues going forwards and end up with a strong bipartisan bill. I would also note that other controversial issues, such as wholesale changes to retransmission consent rules, probably should be left off this legislation, if we want it to move quickly.

Mr. Chairman, thank you for allowing me to submit this statement.

MR. UPTON. We are going to start on the first panel. I think we will be okay with votes for a little while. Members will be in and out, I am sure. Your statements are made part of the record in their entirety. I am going to try to limit your opening statements to no more than five minutes.

We are joined by the Honorable Ken Fellman, Esquire, Mayor of Arvada, Colorado, on behalf of the National Association of Telecommunications Officers and Advisors, the National Association of Counties, the National League of Cities, and the United States Conference of Mayors; Mr. Walter McCormick, President and CEO of the United States Telecom Association; Mr. Kyle McSlarrow, President and CEO of the National Cable and Telecommunications Association; Mr. Tim Regan, Senior Vice President, Global Government Affairs, Corning Incorporated; Mr. Paul Misener, Vice President for Global Public Policy of Amazon.com; Mr. David Keefe, CEO of Atlantic Broadband; Mr. Jerry Fritz, Senior VP for Legal and Strategic Affairs

and General Counsel for Allbritton; and Mr. Jeffrey Citron, who was originally going to be on the second panel but because we have found his chair at the end, Chairman and Chief Strategist of Vonage. Mr. Fellman, we will start with you. Thank you. Welcome to the subcommittee.

STATEMENTS OF HON. KENNETH FELLMAN, ESQ., MAYOR, ARVADA, COLORADO, ON BEHALF OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES, AND THE UNITED STATES CONFERENCE OF MAYORS; MR. WALTER MCCORMICK, PRESIDENT AND CHIEF EXECUTIVE OFFICER, UNITED STATES TELECOM ASSOCIATION; KYLE MCSLARROW, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL CABLE AND TELECOMMUNICATIONS ASSOCIATION; TIMOTHY REGAN, SENIOR VICE PRESIDENT, GLOBAL GOVERNMENT AFFAIRS, CORNING INC.; PAUL MISENER, VICE PRESIDENT FOR GLOBAL PUBLIC POLICY, AMAZON.COM; DAVID J. KEEFE, ON BEHALF OF THE AMERICAN CABLE ASSOCIATION, CHIEF EXECUTIVE OFFICER, ATLANTIC BROADBAND; JERRY FRITZ, SENIOR VICE PRESIDENT FOR LEGAL AND STRATEGIC AFFAIRS AND GENERAL COUNSEL, ALLBRITTON COMMUNICATIONS COMPANY, ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS; AND JEFFREY CITRON, CHAIRMAN AND CHIEF STRATEGIST, VONAGE

MR. FELLMAN. Mr. Chairman, distinguished members of the committee, I thank you for the opportunity to be here. I am the mayor of Arvada, Colorado, and I appear before you today on behalf of organizations that represent elected and professional officials from nearly every municipal and county government in the United States. I commend you, Mr. Chairman, and your colleagues, Chairman Barton, Representatives Dingell, Markey, Pickering and Rush, who have worked diligently on these issues. Unfortunately, we have had less than 72 hours to read, review and consider the full impact of this draft legislation.

At the outset, we are concerned that as written this bill nationalizes what is presently an effective Federal local government partnership and it will likely result in litigation. The bill does respond favorably to some of the issues that we have raised with you in the past. However, we also have significant concerns which we would like to work with you to

address. In particular, we are very concerned that the bill is unclear as to its applicability to IP television services. Certainly this debate will have been in vain if like services are not treated alike. This issue needs to be addressed. The bill appears to give telephone companies substantial relief from local franchising. It does not, however, provide consumers with the benefits that telephone companies have promised would follow. In particular, there are no assurances that more homes, especially those in rural communities, will actually get competitive broadband. Such assurances must be added to the bill.

We appreciate the efforts of the members to keep local government whole with respect to revenues and it appears that the gross revenues definition would largely do that. However, there appear to be unintended consequences in a provision of the bill that would allow providers to deduct from gross revenues the costs of bonding, indemnity and even damages and penalties. We trust that we can resolve this matter with the committee.

With respect to local public access, we hope that the committee would consider allowing local government to continue to receive the greater of one percent or the per-subscriber equivalent that they receive today as was done in Texas, and that way no local government will be forced to terminate services that they are currently providing. We are pleased that the bill recognizes that managing public rights-of-way is properly a function for local government. We hope you would agree that disputes pertaining to that authority do not belong at the FCC, but rather should be addressed in a local court, as is the case today. Similarly, we appreciate that the bill recognizes the authority of local government to provide services directly to our constituents. We are concerned that the bill does not provide subscribers with adequate recourse for consumer complaints. The FCC is not the appropriate venue to set these standards or address these complaints. Local governments do not require new video entrance to deploy to an entire community immediately. Requiring that entire communities have access to service on a realistic and equitable timetable, however, is not an unreasonable barrier. Guarding against economic redlining and requiring that all neighborhoods in our community see the benefit of competitive services is properly a function of local government and is therefore best enforced at the local level. The proposed bill does not yet sufficiently protect those interests.

Mr. Chairman and members of the committee, local government officials recognize the value that competition brings to local residents and we have actively sought it. Contrary to what many have maintained, current law regarding video franchising has not stifled competition. Indeed, the lack of competition is the result of business decisions made by telephone companies not to compete. Nationalizing franchising is not

going to solve the problem of whatever telephone companies actually enter the market and compete. Furthermore, local video franchising has a long record of success. Those who are now making claims to the contrary have not been completely forthcoming about the nature of the franchising process or about their own recalcitrance in franchise negotiations. To my knowledge, no telephone company engaged in this current debate has ever been denied a video franchise in any community where they have applied for one. We believe, as you do, that the current law could be improved to further promote the provision of competitive video services to America's communities. We look forward to working with you and your staffs to find the best way to address our shared goals of greater competition and wider access to the most modern video services available. Thank you.

[The prepared statement of Kenneth Fellman follows:]

PREPARED STATEMENT OF THE HON. KENNETH FELLMAN, ESQ., MAYOR, ARVADA, COLORADO, ON BEHALF OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES, AND THE UNITED STATES CONFERENCE OF MAYORS

Introduction

Good morning Chairman Upton, Representative Markey and other distinguished members of this Subcommittee. My name is Ken Fellman, and I am the Mayor of the City of Arvada, Colorado. I want to thank all the members of the committee that have worked so hard to get us to this point.

I appear here today on behalf of the local governments across the nation, as represented by the United States Conference of Mayors ("USCM"), the National League of Cities ("NLC"), the National Association of Counties ("NACo"), the National Association of Telecommunications Officers and Advisors ("NATOA"), the National Conference of Black Mayors ("NCBM"), the Government Finance Officers Association ("GFOA"), the International Municipal Lawyers Association ("IMLA"), and TeleCommUnity. [1]

On behalf of local government, we would like to thank you for the opportunity to testify on this new legislation. Needless to say, the short time frame between the release of the draft and this hearing has presented some interesting challenges in reviewing the bill, but I hope I can shed some light on our continuing concerns. To begin, we believe this draft is more responsive to those issues we have raised with the Committee in the past, and stand ready to continue working with the Committee to correct what we perceive as flaws in the legislation. Having said that, we are very concerned that this new structure will lead to difficult and lengthy litigation, the will cost everyone dearly.

[1] NLC, USCM and NACo collectively represent the interests of almost every municipal or county government in the U.S. NATOA's members include elected officials as well as telecommunications and cable officers who are on the front lines of communications policy development in cities nationwide. GFOA's members represent the finance officers within communities across this county, who assist their elected officials with sound fiscal policy advice. IMLA is the association representing city and county lawyers in policy matters. TeleCommUnity is an alliance of local governments and their associations that promote the principles of federalism and comity for local government interests in telecommunications.

Hopefully I can dispel many of the untruths that have been circulated recently pertaining to local government involvement in video franchising, while responding to specifics of the bill. We would like to be your "myth-busters" for today – to cut through some of the deceptive claims and to provide you with a truthful picture of the status of cable franchising in the market today, as well as how that franchising supports the desired delivery of new competitive entrants and services.

Title VI Franchising is a National Framework with an Essential Local Component

Congress struck the right balance in 1984 when it wrote Title VI into the Act, and again in 1992 when it made appropriate consumer protection improvements to it. Title VI established a light-touch national regulatory framework for cable television video services that includes appropriate local implementation and enforcement. The Act currently authorizes local governments to negotiate for a relatively limited range of obligations imposed on cable operators. Virtually none of these obligations is mandatory, and each is subject to decision-making at a local level. The current legal structure provides for something I hope we would all agree is important: *local* decisions about *local* community needs should be made *locally*. The proposed legislation retains the linkage to Title VI, which we see as appropriate, and attempts to address these local issues. However, we believe the language can be improved.

Local governments embrace technological innovation and competition and actively seek the benefits such changes may bring to our communities and to our constituents. We want and welcome genuine competition in video, telephone and broadband services in a technologically neutral manner, and support deployment as rapidly as the market will allow. Local governments have been managing communications competition for many years now − it is not new. What is exciting is the potential for new entry into video by a few well-funded and dominant players who appear to have finally made a commitment to enter into the video arena. We look forward to developing an even more successful relationship in bringing these competitive services to our citizens. Unfortunately, this legislation would effectively remove local governments from helping to make that competition a reality.

Local government remains concerned that rhetoric and not facts have led members of Congress to believe that competition and innovation will flourish only if local government is removed from the equation. We are here today to help you understand that nothing could be farther from the truth. Throwing away local franchising is not the solution that will bring competition or rapid entry by competitive providers. This legislation does not solve the many questions associated with accelerated entry into the video business.

Local government has been anxiously seeking the competitive provision of video services for many years – and indeed the Communications Act has explicitly guaranteed such opportunities since 1992. Despite several previous changes in federal law to ease their entry into the video market, the telecommunications companies seeking new laws today have not brought forth the competition they promised. The reason is not local governments. The reason is not the current federal law. The reason is market place economics. The provision of video services has not yet proven to be as financially attractive as the telephone companies apparently require in order to provide the services they claim are the new lynchpin to their success. I believe that a brief review of the current law will demonstrate this trend. One of the shortcomings of the proposed legislation is an adequate definition of a threshold for competition. Is a single subscriber sufficient to trigger "cable competition"? The proposed legislation suggests that it is, and we would argue this is bad public policy. Is it reasonable for Congress to decree that locally negotiated franchises will be trumped whenever a competitor gets a national franchise only serving a small portion of the incumbent's footprint, thereby allowing the incumbent to walk away from its local franchise and take advantage of that minor

competitor? Also unclear is whether or not a company offering of IPTV as a video alternative to cable is actually covered in the definition of "cable operator" in the draft. If IPTV is not covered by this proposed legislation, is this not a futile exercise? These are the some examples of the issues that need resolution.

Managing Public Rights-of-Way is a Core Function of Local Government

Even as technologies change, certain things remain the same. Most of the infrastructure being installed or improved for the provision of these new services resides in the public streets and sidewalks. Local leaders are the trustees of public property and must manage it for the benefit of all. We impose important public safety controls to ensure that telecommunications uses are compatible with water, gas, and electric infrastructure also in the right-of-way. Keeping track of each street and sidewalk and working to ensure that installation of new services do not cause gas leaks, electrical outages, and water main breaks are among the core police powers of local government. And while it seems obvious, these facilities are located over, under or adjacent to property whose primary use is the efficient and safe movement of traffic. It is local government that best manages these competing interests. While citizens want better programming at lower prices, they do not want potholes in their roads, dangerous sidewalks, water main breaks, and traffic jams during rush hour as a consequence. We question whether this legislation adequately addresses constituent/citizen interests in protecting and managing the public rights-of-way.

While the legislation preserves local authority, the draft fails to provide sufficient enforcement authority to assure compliance. We strongly object to the FCC being the appropriate forum for resolving local right of way disputes, and while the legislation is silent on the matter, we believe by default that task would move to the FCC. Just as with the current Act, a court of competent jurisdiction is a more appropriate forum for resolving such disputes.

Neither Franchising nor Current Regulation is a Barrier to Competition

The concept of franchising is to grant the right to use public property and then to manage and facilitate that use in an orderly and timely fashion. For local governments, this is true regardless of whether we are franchising gas or electric service, or multiple competing communications facilities – all of which use public property. As the franchisor we have a fiduciary responsibility to our citizenry that we take seriously, for which our elected bodies are held accountable by our residents.[2]

Our constituents demand and deserve real competition to increase their options, lower prices and improve the quality of services. As you know, a GAO[3] study showed that in markets where there is a wire-line based competitor to cable, cable rates were, on average, 15% lower. Please understand that local governments are under plenty of

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[2] As of five years ago, it was estimated that the valuation of the investment in public rights-of-way owned by local government was between $7.1 and $10.1 trillion dollars. Federal agencies such as the United States Department of Transportation, the U.S. Department of the Interior (Bureau of Land Management "BLM"), the United States Department of Agriculture (U.S. Forest Service) and the National Oceanic and Atmospheric Administration ("NOAA") have all been actively engaged in assessing value for rights-of-way for years. Valuation of rights-of-way, and the requirement that government receives fair market value for their use, can be found in regulations (43 C.F.R. Sections 2803 and 2883) statutes, and case law.

[3] United States General Accounting Office, *Telecommunications Issues in Providing Cable and Satellite Television Service*, Report to the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate, at 9, GAO-03-130 (2002)("*GAO 2002 Study*"), *available at* www.gao.gov/cgi-bin/getrpt?GAO-03-130

pressure every day to get these agreements in place and not just from the companies seeking to offer service. I know this Committee has heard some unflattering descriptions and anticompetitive accusations regarding the franchise process, and I would like to discuss with you the reality of that process.

Like Services Alike

We are encouraged that most of the telephone industry executives and their staff tell us that they fully support local governments' management and control of rights-of-way; that they are willing to pay the same fees as cable providers; that they are willing to provide the capacity and support for Public, Educational and Governmental ("PEG") access programming, and even that they are aware of and agree to carry emergency alert information on their systems. And yet – at least one company claims it is not subject to current law and they do not have to do these very things through local franchise agreements.

Congress must realize that local government franchising has facilitated the deployment of not only the largest provider of broadband services in this country – namely the cable industry – but that we also facilitated the entry of literally thousands of new telephone entrants immediately after the passage of the 1996 Telecommunications Act. We are well versed in the issues of deployment of new services, and have managed competitive entry for the benefit of our communities for many years. Local government supports treating like services alike.

Private Companies Using Public Land Must Pay Fair Compensation

At the same time that we manage the streets and sidewalks, local government, acting as trustees on behalf of our constituents, must ensure the community is appropriately compensated for use of the public space. In the same way that we charge rent when private companies make a profit using a public building, and the federal government auctions spectrum for the use of public airwaves, we ensure that the public's assets are not wasted by charging reasonable compensation for use of the public rights-of-way. Local government has the right and duty to require payment of just and reasonable compensation for the private use of this public property – and our ability to continue to charge rent as a landlord over our tenants must be protected and preserved. We believe the proposed legislation makes an attempt to do this, however, it may have fallen short of the goal because even though it provides for franchise fees, it does not provide for auditing the payments or provide for enforcing payment obligations.

We are also specifically concerned about some exclusions in the definition of "gross revenues." Paragraph C excludes revenue from "information services" in defining gross revenue. Since the Brand X decision by the Supreme Court, there has been a move to define most IP-based services as an "information service." Some telephone companies have argued that IP video programming is an "information service" and not a "cable service." Is this a backdoor way to avoid paying franchise fees? Also, Paragraph (E) excludes from gross revenues "any requirements or charges for managing the public rights-of-way with respect to a franchise under this section, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages;…" We believe this goes substantially beyond reasonableness and should be stricken from the draft. It would basically allow companies to exclude from gross revenues any costs associated with protecting the public or damages incurred as a result of being a bad actor in the franchising area. Essentially this language allows a company to take credit against franchise fee obligations for any damages it may cause in a community. Are FCC penalties and fees excluded from gross revenue? The draft is not clear.

It is also unclear as to the definition of the local franchising areas for new entrants. What is their operational footprint? Who are they responsible for paying? How is that determined?

Social Obligations Remain Critical Regardless of Technological Innovation

Communications companies are nothing if not innovative. When you think back over the course of the past 100 years, the changes in technology are mind-boggling. At the same time, the social obligations developed over the last 60 years have endured. I strongly urge the Committee to engage in a deliberative process, and take the time necessary to engage in dialogue and debate to ensure that any legislative changes adopted this year will be as meaningful 20 years from now as they are today.

Historical and Current Role of Social Obligations

I appreciate the opportunity to discuss with you the important social obligations inherent in current video regulation, and to explain why these core functions must be preserved, regardless of the technology used to provide them. These include the allocation of capacity for the provision of PEG access channels, prohibitions on economic redlining, and a basic obligation that local government evaluates, and the provider meets, the local needs of the community it serves, including public safety needs.

Public, Educational and Governmental (PEG) Access Channels

Historically and today, locally produced video programming performs an important civic function by providing essential local news and information. Under the existing law, local government can require that a certain amount of cable system capacity and financial support for that capacity be set aside for the local community's use. This capacity is most often used in the form of channels carried on the cable system and are referred to as PEG for public, educational and governmental channels. Traditionally the local franchising authority has determined the required number of channels and amount of financial support required to meet community needs, it then determines the nature of the use, which may be mixed between any of the three categories. Public channels are set aside for the public and are most often run by a free-standing non-profit entity. Educational channels are typically reserved for and are managed by various local educational institutions. Government channels allow citizens to view city and county council meetings, and watch a wide variety of programming about their local community that would otherwise never be offered on commercial television, including in some cases, television shows hosted by our Congressional representatives. Whether it is video coverage of governmental meetings, information about government services or special programs, local law enforcement's most wanted, school closings or classroom instruction, the government access or PEG programming is used to disseminate this information and to better serve and interact with our constituents. Local governments continue to make innovative uses of this programming capacity as new interactive technology allows more valuable information to be available to our constituents.

The proposed legislation acknowledges the importance of these video offerings and provides for PEG capacity on new entrant systems, provides for interconnection between existing PEG and INET capacity to the new entrant and provides a mechanism to make that happen. The proposed legislation also provides for PEG financial support and for expansion of PEG capacity every ten years. These are all very well intentioned, and clearly the Committee heard most of what local governments were saying about the importance of these resources. However, the draft provides for only one percent of gross revenues to go for PEG support. In some jurisdictions, this will be sufficient. In others it may not. We would recommend that along with the one percent, those jurisdictions that have negotiated a higher figure be allowed to maintain that rate per subscriber, sufficient

for maintain existing services. We also recommend that the financial support use definition be expanded to include "operations."

Economic Redlining

One of the primary interests served by local franchising is to ensure that services provided over the cable system are made available to all residential subscribers within a reasonable period of time. These franchise obligations are minimal in light of the significant economic benefits that inure to these businesses that are given the right to make private use of public property for profit. While there may be those who find certain franchise build out obligations unreasonable – we find them to be essential. The concept of "universal service" in telephone is no less important than in the case of broadband. Those who are least likely to be served, as a result of their economic status, are those whom we need most to protect. This deployment helps to ensure that our citizens – your constituents -- young and old alike, are provided the same opportunities to enjoy the benefits of cable and broadband competition – regardless of income. The capacity that broadband deployment offers to our communities is the ability of an urban or rural citizen to become enriched by distance education, and other opportunities that until recently were not available. But that will never happen if only the most fortunate of our residents, and the most affluent of our neighborhoods, are the ones who receive the enormous benefits of broadband competition. The spectre of "buildout" requirements haunts the discussion of serving the full community. Local governments have been managing this process for decades, and there is no reason to believe it cannot continue. Local officials have a responsibility to assure that the citizens of the community have access to competition. At the same time, we recognize that there needs to be sufficient flexibility on the part of the local franchising authority to address real world challenges, such as very low subscriber density, actual operational footprint of competitors and so on. The proposed legislation does take on the challenge of opposing redlining, but once again fails to provide sufficient enforcement authority (indeed, the draft is incomplete in this area) to protect constituents. These should be local decisions with local enforcement based on local factors, not issues decided by Congress or the FCC.

Public Safety and Community Needs

Local leaders often focus on the needs of their first responders when evaluating community needs. The current law provides that local governments may require cable franchisees to provide institutional networks as part of the grant of a franchise. An institutional network is a network dedicated to the purpose of governmental and institutional communications needs. These are essentially "intra-nets" serving government facilities including police and fire stations, hospitals, schools, libraries and other government buildings. Institutional networks are typically designed to use state-of-the-art technology for data, voice, and video and allow local governments to utilize advanced communications services at minimal taxpayer expense. It has proven effective not only for day to day municipal and educational training and operations – but essential in emergencies such as September 11, 2001. [4] The proposed legislation does address Emergency Alert Systems in that it provides for local government utilization of a cable operator's emergency alerts system. The proposed legislation should make clear that new entrants can be required to provide emergency alter systems in our communities. Also in

[4] *Hearing on the Nation's Wireline and Wireless Communications Infrastructure in Light of Sept. 11 Before the Committee on Commerce, Science, and Transportation,* 107th Cong. (2002) (statement of Agostino Cangemi, Deputy Commissioner and General Counsel of New York City's Department of Information Technology).

the VoIP arena, the Committee acknowledges the need for 911 and E911 capability for public safety.

Public Interest

I suggest to the Committee that these public interest obligations, noted above, continue to serve an important purpose and must be preserved, regardless of the technology that allows us to make the programming available. I hope that you would not yield to the simplistic notion that reducing public obligations on providers is always the best course. Customer service and consumer protection are examples of this concern. Should every community be required to do no more than what the FCC mandates, some citizens may not be afforded the protection they deserve. Telephone and cable companies are well versed in these arenas at the local level today. It should not be a problem for them to maintain (and hopefully improve) their customer service and consumer protection. Major problems with the customer service provisions of the legislation are that its local enforcement decision to be appealed (and ultimately enforced) at the FCC. Neither consumers nor local governments can afford the expense of that kind of enforcement mechanism. Moreover, the legislation allows a local government to charge a "nominal fee" to cover the cost of issuing enforcement orders. This "nominal fee" language should be replaced with a provision to cover actual costs, including reasonable attorney fees. Local government must be able to enforce these important safeguards, and must be able to the cost of doing so.

We also believe that at renewal, providers should be subject to a public hearing to determine whether they have violated any of the four conditions for revocation, and whether they have met the customer service and consumer protection standards.

Strong Enforcement

As I have repeatedly said, local government should not be stripped of its power to enforce these local obligations. Currently, local government is able to audit companies that submit revenue and to enforce public safety obligations pertaining to rights-of-way in federal court. The Federal Communications Commission has no expertise in these areas and should not be given any authority over arbitrating revenue disputes or rights-of-way disputes. Such a radical expansion of federal power into local affairs is not warranted.

Alternative to National Franchising

Local Franchising is Comparatively Efficient and Must Be Fair to Protect All Competitors

Franchising need not be a complex or time-consuming process. In some communities the operator brings a proposed agreement to the government based on either the existing incumbent's agreement or a request for proposals, and with little negotiation at all, an agreement can be adopted. In other communities, where the elected officials have reason to do so, a community needs assessment is conducted to ascertain exactly what an acceptable proposal should include. Once that determination is made, it's up to the operator to demonstrate that it can provide the services needed over the course of the agreement or demonstrate that the requirements would be unreasonable under the conditions of the particular market.

Furthermore, while some of the new entrants have asserted that franchise negotiations have not proceeded as fast as they would like, it is important to recognize that every negotiation must balance the interests of the public with the interests of the new entrant. Some new entrants have proposed franchise agreements that violate the current state or federal law and subject local franchise authorities to liability for unfair treatment of the incumbent cable operator vis-à-vis new providers. Some also seek waiver of police powers as a standard term of their agreement. No government can waive its police powers for the benefit of a private entity. In the same way, the federal

government cannot waive the constitutional rights of its citizens. Unlike other business contracts that are confidential or proprietary, local government franchise agreements are public record documents, so a new provider knows the terms of the incumbent's agreement well before it approaches a local government about a competitive franchise.

Local governments are obligated to treat like providers alike, and we believe in the concept of equity and fair play. In addition, many states have level playing field statutes, and even more cable franchises contain these provisions as contractual obligations on the local government. If the new competitor is seriously committed to providing as high a quality of service as the incumbent, the franchise negotiations should not be complicated or unreasonably time consuming. Moreover, local government has no desire to make new entrants change their current network footprint to duplicate the incumbent cable operator's technology or network design. Local government's concern is to treat all providers fairly, as required by current franchise agreements, by federal law, and good public policy.

Franchising Provides for Reasonable Deployment Schedules – Objections to Reasonable Build Obligations are Red Herrings

Nothing in franchising or current federal law requires a new video entrant to deploy to an entire community immediately. Local governments have been negotiating franchise agreements with new entrants for many years. In these cases, newly built developments may have one schedule while existing areas may have a different schedule. By managing the deployment as we do, we protect the new provider's investment in infrastructure. We protect the public from unnecessary disruption of the rights-of-way, including safe use and enjoyment of the public rights-of-way. And, we ensure that new entrants are provided with unfettered access in a reasonable and timely fashion, while ensuring that they comply with all safety requirements. This system has worked well for cable, traditional phone and other providers for many years, and is necessarily performed by the local government. Congress, when it authored Section 253 of the Act, preserved local government authority and evidenced its desire to maintain the federalist, decentralized partnership that has served our country well for 200 years. Unfortunately, this bill appears to abrogate these important principles of federalism.

The Current Framework Safeguards Against Abuse and Protects Competition

The current framework ensures that all competitors face comparable obligations and receive the same benefits, ensuring a fair playing field and avoiding regulatory gamesmanship. Federal safeguards protect against abuse. Local governments generally are prohibited from requiring a video service network provider to use any particular technology or infrastructure such as demanding fiber or coaxial cable. Local governments can require that construction and installation standards be adhered to and that systems are installed in a safe and efficient manner. Local governments require compliance with the National Electric Safety Code to protect against the threat of electrocution or other property damage. Local rules can also require that signal quality be up to federal standards, and that systems are maintained to provide subscribers with state-of-the-art capabilities. Similarly, it is local government that inspects the physical plant and ensures compliance on all aspects of operations. We work closely with our federal partners and cable franchise holders to ensure that cable signal leaks are quickly repaired before there is disruption or interference with air traffic safety or with other public safety uses of spectrum.

Local Government Helps Ensure Broadband Deployment

We all share the concern of a lack of broadband access throughout America, in urban and rural areas alike. Regardless of the locality, it is likely that communications technologies will be a driving force in the economic opportunities enjoyed by these

communities that have access to advanced services. I believe that the Cable Act has provided significant benefits to consumers and communities alike, and I believe that local governments should be applauded for ensuring that those benefits are provided in a timely, fair and efficient manner to as many constituents as possible. Under the current regulatory regime, cable enjoys the highest deployment rate of broadband in this nation, with over 105 million homes having access to cable modem service. The cable industry is now reaping the economic benefits of an infrastructure that is capable of providing broadband access to all of our citizens. It is local government's oversight and diligence, through the franchise process, that has ensured that our constituents are not deprived of these services. Local government is the only entity that can adequately monitor and ensure rapid, safe and efficient deployment of these new technologies when they are being installed on a neighborhood-by-neighborhood level in our local rights-of-way.

Changes Local Government Agrees Would Enhance the Competitive Environment

We appreciate the opportunity to share with the Committee, based on our extensive expertise, those sections of the Act that, with some modification, would enhance the provision of competitive services within our communities, rather than pursue the strategies of this legislation.

Application of Title VI

Local government seeks modifications to clarify that the provision of multichannel video services through landline facilities, regardless of the technology used, falls within the scope of Title VI. The Act does not permit local government to dictate the nature of the technology employed by the provider. It does permit the local government to require that once the technology has been selected, that the quality of the service is acceptable. The quality of service should be maintained, and it should apply in a technology neutral manner.

Uniform Assignment of Responsibilities Among Levels of Government

Local government should retain authority over local streets and sidewalks, no matter what provider is offering service, or what service is being offered. At the same time Congress is considering allowing federal agencies to determine which companies can offer video services, all companies in the local rights-of-way should be responsive to the local government.

Streamlining of Franchise Negotiations

Title VI establishes the broad framework for those elements that may be negotiated in a local cable franchise. The provision of PEG access capacity and institutional networks is specifically protected in the current Act. Requirements in that regard should be presumptively reasonable, and a local government should be given the flexibility to determine the appropriate amount of capacity and the appropriate level and use of funding support necessary to meet its local community's own particular needs. The current Act permits extensive community needs assessments, which while valuable, may be costly and time consuming, and may prove unnecessary when considering the applicability of the obligation on a new entrant. We believe that when a competitive franchise is under consideration, the local government should have discretion to use these tools on an as-needed basis to verify, but not be obligated to "prove," the need for the particular PEG or institutional network requirement. The Act should require a new entrant to provide at least comparable capacity and support for the provision of PEG access, as well as for the provision and support of institutional networks. Similarly, local governments must be authorized to require the interconnection of these services between the incumbent provider's system and new entrant's system, to ensure seamless provision of services to our citizens.

Time Limits for Negotiations

Local governments have experienced just as much frustration as many in the industry with regard to the time consumed by franchise negotiations. While it is easy to claim that local governments are the cause for delay, let me assure you that the industry is also to blame for not always pursuing negotiations in a timely and efficient manner. Just as the industry would call upon local government to be under some time constraint for granting an agreement, so too should they be held to time frames for providing the necessary information on which a decision can be made and for responding to requests to negotiate in good faith. Otherwise, a time frame merely gives the applicant an incentive not to reach an agreement but to wait until the time frame expires. We do not believe that it is unreasonable to establish some time frames within which *all* parties should act, whether it is on an application for the grant of an initial franchise, for renewal, transfer or for grant of additional competitive franchises. But these obligations must apply to both sides and must be respectful of the principles of public notice and due process. Applicants must be required to negotiate in good faith rather than insisting on their own "form" agreement. No community should be forced to make a determination without permitting its citizens – your constituents – the opportunity to voice their opinion if that is the process that government has put into place for such matters.

Network Neutrality

While traditional cable operators under Title VI operate on closed platforms, the Act itself does not address the variety of services or content that may be provided over that platform. Recent press accounts have indicated that telephone company new entrants in the video marketplace also want to be able to control the ability of the end user to access information purchased over the network. Faster speeds for those who pay more; and faster access to those locations on the Internet for which the content provider has paid a higher price to the network owner. Local government believes that permitting such favoritism and content control by a network owner is bad for the end user, bad for business and bad for the future of the Internet. To the extent that such issues need to be addressed within Title VI, we encourage the Committee to do so.

Consumer Protection and Privacy

The Communications Act has significant and meaningful consumer protection and privacy provisions. These are national rules with local enforcement and they include the ability of the local government to continue to enforce more stringent local consumer protection requirements. These rules must be extended to all video providers – to ensure that information on your personal choices of what you watch on whatever device you choose to receive your video signal on – is not being used in an impermissible or improper manner.

Finally, we continue to support the ability of local governments and the citizens they serve to have self-determination of their communications needs and infrastructure. Title VI has always recognized our ability to do so in the video marketplace, and we hope that Congress will continue to agree that such should be the case regardless of the services delivered over the network. Where markets fail or providers refuse, local governments must have the ability to ensure that all of our citizens are served, even when it means that we have to do it ourselves.

Conclusion

In the rush to embrace technological innovation, and to enhance the entry of new competitors into the market, it is still the responsibility of local government to ensure that the citizens of our communities are protected and public resources are preserved. We are concerned that this legislation will undermine all that has been achieved through years of thoughtful and careful deliberation. Local control and oversight has served us well in the

past and should not be tossed out simply as the "old way." This year, as the discussion of the delivery of new products and services over the new technology platforms includes not just video but new and enhanced video products and other potential services, I strongly encourage this Committee to rethink its headlong rush to judgment on this legislation. It has been available to the public for just three days. Certainly it is unnecessary to move so quickly as to ignore the substantial record of achievement evidenced by what we have shared with you today. Thank you. I look forward to answering any questions you may have.

MR. UPTON. Thank you. Mr. McCormick, welcome back.

MR. MCCORMICK. Thank you, Mr. Chairman. On behalf of the United States Telecom Association and our member companies, I want to thank you for the opportunity to be here today to testify. I want to express our deep appreciation for the enormous work that has gone into this legislation.

Mr. Chairman, we strongly support your efforts to bring new video choice to America's consumers. Franchise reform will unleash new competition, and experience has shown that competition will result in reduced rates for the nation's 66 million cable television subscribers. Enactment of franchise reform will also encourage investment in next-generation broadband networks. The ways in which Americans communicate today, the ways in which they send and receive information have changed fundamentally since the passage of the 1996 act. Today you can make a phone call using a wireline phone or a wireless phone or a cable phone or an Internet phone. You can get Internet access through DSL, cable modem, wireless, or satellite, and increasingly over power lines and municipal wi-fi systems. Technology has made it possible for cable operators who historically offered only video to offer voice and Internet services. There are no franchise barriers to cable operators doing so. Technology has also made it possible for voice providers to offer video, but an archaic governmental system that was meant for a time when technologies were segregated, rather than converged, is a barrier to competitive entry into video. This legislation recognizes that it is time to remove this barrier and to promote the same competition in video that now exists in voice.

Make no mistake, local franchising requirements impede entry. They extend the period during which consumers pay artificially high prices. Let me give you two real-world examples. First, Ben Loman Telephone Cooperative in McMinnville, Tennessee, has upgraded its network and has the capacity to offer video service to approximately 60 percent of its 42,000 customers. However, in order to offer video, it must apply for and receive 25 different franchise agreements, some of which are required for areas in which it services just 100 to 200 customers. After 18 months of trying, the company has received only 15 franchises. In the case of Verizon, one year after engaging in franchise

negotiations with 95 local franchising authorities, only 10 have granted franchises and 85 remain in negotiation. Typically the process takes 18 to 24 months.

So Mr. Chairman, the quicker Congress acts, the better it is for consumers. Time is money. According to a study by the Phoenix Center, if franchise reform were to be postponed until the next session of Congress, that one year of delay would cost consumers an estimated $8 billion. That equates to about $75 per household per year. So you are doing America a service by moving forward immediately on video choice, an area where there is clear consumer benefit as you continue to work towards finalizing other important telecom reforms relating to universal service, intercarrier compensation, and unleashing the full benefit of the free market to traditional voice services that face competition.

Mr. Chairman, as we share your goal to see action on other important telecom reforms before the end of this Congress, let me take a moment to express our concern about three matters unrelated to franchise reform that have made their way into this bill, matters that we believe would benefit from further consideration by the committee.

First, on the issue of so-called net neutrality, our industry has stated that it will not block, impair, or degrade consumer access to the Internet and the FCC has made clear that it has the authority to enforce its broadband principles. Therefore, legislation in this area we believe is premature. There are provisions in this legislation that benefit VOIP providers by giving them rights of telecommunications carriers, without imposing upon them the corresponding social responsibilities relating to universal service, consumer privacy, and access for the disabled. These matters should also be left to further telecom reform.

And finally, with regard to municipal broadband networks, we are concerned about this bill's preemption of State authority over their own municipalities. Again, we would suggest that this subject be left to the broader telecom reform debate.

Let me conclude, Mr. Chairman, by saying thank you. We applaud you bringing Americans TV freedom and we look forward to working with you towards speedy and final action on video choice in this Congress.

[The prepared statement of Walter McCormick follows:]

PREPARED STATEMENT OF WALTER B. MCCORMICK, JR., PRESIDENT AND CHIEF EXECUTIVE OFFICER, UNITED STATES TELECOM ASSOCIATION

Statement of Walter B. McCormick, Jr.
President and CEO of the United States Telecom Association
To the House Energy & Commerce Subcommittee on
Telecommunications and the Internet
March 30, 2006

Mr. Chairman, my name is Walter McCormick. I serve as President and CEO of the United States Telecom Association (USTelecom). On behalf of our more than 1,200 member companies, I would like to thank you for this opportunity to appear before the Subcommittee regarding "The Communications Opportunity, Promotion and Enhancement Act of 2006." I would also like to thank the committee members and staff who have been working for more than a year now on this important issue. The House Energy & Commerce Committee has been at the forefront of this historic effort, and we appreciate your leadership and determination.

As you know, our member companies offer a wide range of services across the communications landscape, including voice, video and data over local exchange, long distance, wireless, Internet and cable networks. USTeleom's membership ranges from the smallest rural telecom companies to some of the largest corporations in America. We are united in our belief that it is time to update the nation's communications laws to reflect the dramatic technological and marketplace changes all consumers have witnessed in recent years.

USTelecom enthusiastically supports national video franchising. We believe that consumers should be free to choose the video services they want from whatever provider they prefer. Franchise reform will unleash new competition, and experience has shown that competition will result in reduced rates for the nation's 66 million cable television subscribers. Enactment of franchise reform will also encourage investment in next-generation broadband networks. We applaud you for proposing franchise reform, and we urge you to move forward expeditiously to bring TV Freedom to America's consumers.

Competition has arrived in voice communication --- it is only emerging in video

Mr. Chairman, the ways in which Americans communicate, the ways in which they send and receive information, have changed fundamentally since the passage of the 1996 Telecommunications Act. Today, you can make a phone call using a wireline phone, or a wireless phone, or a cable phone, or an internet phone. You can get internet access through DSL, or cable modem, or wireless, or satellite – and, increasingly, over powerlines and municipal wi-fi systems. Technology has made it possible for cable operators, who historically offered only video, to offer voice and internet services. And, there are no franchise barriers to their doing so. Technology has also made it possible for voice providers to offer video. But, an archaic governmental system that was meant for a time when technologies were segregated, rather than converged, is a barrier to competitive entry into video. It is time to remove this barrier, and to promote the same competition in video that now exists in voice.

Consumers benefit when companies compete. And, clearly, consumers would benefit from new competition to cable. According to the FCC, cable rates increased 86% from 1995 to 2004. The cable industry does not like us calling attention to this statistic. Indeed, they dislike it so much that they have refused to run our television ads in our nation's capital where this debate is taking place. They claim that the real, "channel-adjusted" figure, is closer to 57%. Regardless of whether the increase is in real terms, or in "channel-adjusted" figures, it is a whopping increase – one that the Chairman of the Federal Communications Commission said last week is unparalleled in any other area under his jurisdiction.

So, the quicker Congress acts, the better it is for consumers. Time is money. According to a study by the Phoenix Center, if franchise reform were to be postponed until the next session of Congress, that one year of delay, would cost consumers an estimated $8 billion. A two-year delay would cost Americans nearly $16 billion. This equates to about $75 per household per year. On a state-by-state basis the numbers are equally substantial. One year of delay in franchise reform would cost:

- Michigan consumers $271 million;
- Massachusetts consumers $165 million; and
- Florida consumers $626 million.

Consumers will pay a steep price for delay.

The GAO, too, has studied trends in cable pricing and the effects of competition. It has found that cable faces wireline competition in only 2 percent of its franchise areas. But wireline competition has an impact that satellite competition does not. The GAO has found that prices are 15 percent lower where cable faces a wireline competitor.

Local franchising requirements impede entry. They extend the period during which consumers pay artificially high prices. Let me give you two examples:

- Ben Lomand Telephone Cooperative in McMinnville, Tennessee, has upgraded its network, and has the capacity to offer video service to approximately 60 percent of its 42,000 customers. However, in order to offer video, it must apply for and receive 25 different franchise agreements, some of which are required for areas in which it serves just 100-200 customers. After 18 months of trying, the company has received only 15 franchises.

- In the case of Verizon, one year after engaging in franchise negotiations with 95 local franchising authorities, only 10 have granted franchises and 85 remain in negotiation. Typically, the process takes 18 to 24 months.

Therefore, Mr. Chairman, we support your moving forward to enact legislation in this Congress to extend the same competitive benefits in the video market as consumers now enjoy in the voice market.

Broadly Updating Our Nation's Telecom Laws

USTelecom and its member companies believe that the philosophy that underlies video choice is one that should apply broadly to Congress's updating of the telecom laws – that is, that the world of communications has changed, that it is time to move beyond government managed competition and embrace market-based competition, and thereby give consumers the ability to obtain the services they want from the companies they choose. We therefore urge the Committee, after it acts on video choice, to follow through on its stated intention to proceed forward expeditiously on separate legislation in this Congress to stabilize universal service, to address inter-carrier compensation, and to unleash the full benefit of the free market to traditional voice services that face competition. We understand the Committee's decision to not address these broader issues as part of this legislation, instead opting to address them in a separate package, in order to expedite action that will bring to consumers the immediate benefit of video choice. In this regard, however, we would respectfully suggest that the provisions in the Communications Opportunity, Promotion and Enhancement Act regarding net neutrality, VOIP E-911, VOIP interconnection, and government-owned broadband networks are also ones that address matters that are unrelated to video franchise reform. Each involves matters that would benefit from further examination by the Committee.

On the issue of so-called "net neutrality," our industry has stated that it will not block, impair or degrade consumer access to the internet, and the FCC has made clear that it has the authority to enforce its broadband principles. Therefore, we believe that legislation in this area is premature. Any grants of new regulatory authority or statutory ambiguities could chill innovation and investment.

Similarly, we are concerned by provisions in this legislation that might be used to justify a delay in implementing important 911 services by VOIP providers. Emergency services are today technically feasible, commercially practicable and already being provided by responsible VoIP providers. Additional provisions in this legislation, that are unrelated to video franchise reform, appear to benefit VoIP providers by giving them the right to, and benefits of, interconnection as if they are telecommunications carriers, but without demanding of them the important societal requirements imposed on all other telecommunications carriers, such as contributions to universal service, consumer record protections, and access for the disabled. With regard to interconnection, commercial, free market negotiations are working well. There is no need for regulation. At a minimum, the bill should be clarified to ensure that the rural exemption is not affected by these provisions, and that measures be taken to insure that these interconnection rights do not undermine universal service or exacerbate arbitrage of the intercarrier compensation regime.

Finally, we are concerned by provisions in this bill whereby Congress would pre-empt the authority of the states over their own municipalities with regard to deployment of government-owned broadband networks. While we agree that any government-owned enterprise should be precluded from having advantages or benefits granted by the authority that owns it, the prohibition in the bill appears to be unenforceable. We believe

that this is a matter unrelated to franchise relief, and therefore something that should be the subject of other legislation.

Moving Towards A Consumer-Controlled Marketplace for Video

In summary, USTelecom applauds the Committee for its work in lifting the barriers to entry into the provision of video services, and for moving expeditiously towards a consumer-controlled marketplace for video. As you know from our advertising, we refer to it as "TV Freedom," and we believe that competition and choice will bring America the future … *faster.* We look forward to working with the Committee toward speedy and final action in this Congress.

MR. WALDEN. [Presiding] Thank you, Mr. McCormick. Mr. McSlarrow, welcome. We look forward to your comments.

MR. MCSLARROW. Thank you, Mr. Chairman. At the outset, let me just say, the cable industry supports reforming and streamlining the franchising process. We put out last year a roadmap to reform that consisted primarily of trying to ensure that if time was the issue for new entrance to get into the marketplace, that should be taken off the table and we would support any effort to grant them a franchise within as little as 30 days. We also thought it was important that there be a level playing field. We are talking about competing with the telephone companies, some of the largest communications in the world and certainly the largest in America, we ought to all be playing on the same field. We also thought it was important to recognize whether or not the scheme is called local franchising, national franchising, or even State, that we needed to grapple with fundamental realities of sets of responsibilities that are properly subject to the local control to State, perhaps, and to the Federal government.

The bill last year, and there were two versions, BITS I and BITS II, we opposed because we thought it was not the right course. We didn't think it made sense to pick winners and losers on the basis of technology and so we are pleased that this bill moves away from that construct. We also have made the argument that Members have already recognized this morning, that you need to look at the entire marketplace. In a bundled world where voice, video, and data are being sold and marketed by many different providers to consumers, you need to look at that entire marketplace. We thought it was important that a recognition of the voice marketplace be reflected in the bill and so we are pleased that with the interconnection language that has been put in, that that has been recognized as well. And ultimately, it is clear that in this bill as introduced, there really was an effort to seek to provide a level playing field. So all of that in our view represents significant progress.

Some practical observations, however, about the bill. Even though our preferred solution is to reform and streamline the local franchising process, you can certainly make an intellectually coherent argument for a national franchising process. You can do it on the basis of simplicity, regulatory certainty, and deregulation, but frankly, if those are the goals of a national franchise, I would submit respectfully, this doesn't actually accomplish that. A couple of examples. A telephone company comes into a market and starts offering video. Under this bill, they get a national franchise. If they do that, the good news is there is a level playing field so the incumbent cable operator can get a national franchise. However, if both the telephone company and a cable company already have franchises before date of enactment, those local franchises keep going until expiration. Most bizarrely of all, if a telephone company gets a national franchise followed by a cable company and then

the telephone company exits the market, we are at risk of the national franchise and have to go reapply for a local franchise. Now, I am not certain that that is what was intended by the drafting, but that is what is present and so I would suggest and would be happy to work with you, there needs to be some work done.

When it comes to interconnection, I said a moment ago that we were pleased that there is a recognition of the voice market. As currently written, we think that the rights extended to VOIP providers ought to be expanded to at least match that of the CLECs, granted in the 1996 Act, and so we look forward to working with you on that as well.

Another issue that I think bears thinking about is this issue of non-discrimination, in the provision of video service. Everybody, every Member that I have talked to, probably everybody on this panel, certainly my good friend Walter McCormick and his constituent companies, all say we support the anti-discrimination language, the anti-redlining language that is in current law, but how can that possibly be effective language in a circumstance where you contemplate a company's ability to self-select the markets they serve. It is just an illusion. So I would submit you can go down one of two paths. You can just say it is no longer a bipartisan policy as has been present for 20 years and just go down that path, or if it is going to mean something, then I think we need to step back and think about what non-discrimination means in the context of a national franchising scheme.

Last point, I hate to agree with my colleague from USTA, but real concerns that crafting the line on net neutrality where the marketplace is working and having the Government regulate the Internet for the first time is a mistake and so we just urge you to reconsider that as well. Thank you.

[The prepared statement of Kyle McSlarrow follows:]

PREPARED STATEMENT OF KYLE MCSLARROW, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Chairman Barton and Members of the Committee, my name is Kyle McSlarrow and I serve as President and CEO of the National Cable & Telecommunications Association (NCTA), which is the principal trade association representing the cable television industry in the United States. Its members include cable operators serving more than 90% of the nation's cable television subscribers, as well as more than 200 cable programming networks and services. NCTA's members also include suppliers of equipment and services to the cable industry. The cable industry is the nation's largest broadband provider of high speed Internet access after investing $100 billion over ten years to build out a two-way interactive network with fiber optic technology. Cable companies also provide state-of-the-art digital telephone service to millions of American consumers.

Thank you for inviting me to comment on proposed legislation to reform the video franchising process. I would also like to thank you, Chairman Barton, Chairman Upton and Congressmen Dingell, Markey and Pickering, and the members of this Committee for

your work on these issues and your willingness to listen to the concerns and views of the cable industry throughout the process.

Cable Embraces Competition and Less Regulation

Mr. Chairman, the cable industry fully embraces, and thrives today in, a robust, competitive marketplace. Our policy for several decades has been to minimize regulation on us and our competitors. The cable industry has never asked Congress for a handout and we don't seek to obtain regulatory advantages over our competitors. Nor have we opposed efforts designed to lighten regulatory burdens on our competitors in order to foster fair competition on a level playing field.

For example, in 1999 the cable industry supported the Satellite Home Viewer Improvement Act (SHVIA), which authorized direct broadcast satellite (DBS) providers to offer local broadcast signals. DBS providers were given "local-into-local" authority but were required to follow the same rules as cable and other MVPDs when they offered local signals. SHVIA established a fair and level playing field for multichannel video competition. And as a result, growth in DBS subscribership exploded and competition in the multichannel video marketplace is thriving. Today, two national DBS providers have captured nearly 30 percent of the MVPD marketplace.

The cable industry did not oppose a key provision of the 1996 Telecom Act that eliminated rules prohibiting telephone companies offering video service. Rather, we supported that legislation because it offered all competitors the ability to enter new markets on fair, market based terms and established a stable deregulatory environment.

And, more recently, the cable industry supported the efforts of the telephone companies to deregulate their high speed Internet access service so that they could compete with all broadband providers on a level playing field.

Franchise Reform Legislation Should Streamline the Process and Establish a Level Playing Field

Our primary interest in franchise reform is to ensure that all competitors in the video marketplace compete under the same set of rules, rules that can undoubtedly be streamlined in a more deregulatory market.

To the extent that Congress believes that the franchise process needs to be modernized, the cable industry has clearly stated its preferred path to reform. We have expressed support for franchise reform that embodies the following principles:

- First, in order to expedite entry to market for new competitors, we believe that Congress should streamline the process by limiting the time that local franchising authorities have to consider an application to provide video service.
- Second, it is critical for all providers of video services to be treated on a level playing field. An incumbent should have the right to opt into any new franchise agreement that has better terms and conditions. The government should not pick winners and losers in the broadband industry by establishing a different set of rules that favor one provider over another.
- Third, local governments should maintain oversight with respect to rights-of-way management, meeting community needs and interests (including the equitable sharing of PEG and institutional network responsibilities), and enforcement of non-discrimination requirements.

The Telephone Companies Have Had a Decade to Enter the Video Market

In 1996 when Congress lifted the ban on telephone entry into the video business, it was a significant change in federal telecommunications policy. For decades, Congress kept the telephone companies out of the video business for fear that their monopoly

control over the local phone market would allow them to exert market power in a way that would harm video competition. This threat was based on the telephone companies' anticompetitive behavior regarding pole attachments and their incentive and ability to shift costs associated with video service into their regulated telephone rate base and thereby unfairly cross-subsidize their entry into the video business with revenues from their telephone monopoly.

However, Congress lifted the ban in 1996 largely because the '96 Telecommunications Act also established rules to promote competition in the local voice market. Congress hoped that such competition would inhibit the ability of the Bells to use their telephone monopoly to enter the video marketplace in an anticompetitive manner.

The '96 Act gave the phone companies four options for entering the video business and expressly stated that if they chose to enter as a cable system, they would be subject to the same requirements of Title VI as any other cable operator. At that time, the telephone companies didn't complain that the local franchising process was a barrier to entry and Congress evidenced no interest in freeing telephone companies that chose to enter the cable business from any of the traditional requirements that apply to cable operators, whether they were first to the market or last. To the contrary, recognizing that large incumbent telephone companies were fully capable of competing vigorously in the video marketplace, Congress stipulated that cable operators would be free from any remaining rate regulation whenever a telephone company entered an operator's franchise area.

Now a decade later, having made little effort to enter the video business, the phone companies are back claiming that they need special rules that would allow them to enter the video marketplace in a manner that would give them a regulatory advantage over their competitors. It is remarkable that Congress would even entertain the Bells new pleas for special favors when the very rationale for allowing the Bell companies to enter the video business in the first place has yet to materialize—competition in the local voice market. Rather than spending the last ten years offering video competition, as they promised, they have invested their time and tremendous financial resources in the courts and at the FCC attempting to frustrate Congressional efforts to promote voice competition. They have successfully crushed most of their local voice competitors and swallowed their long distance competition. Ten years after the passage of the 1996 Telecom Act, the incumbent telephone companies still have a vice grip on 85% of the local telephone marketplace.

Meanwhile, during those same ten years, competition to cable operators from two large DBS companies has increased dramatically. In stark contrast to the behavior of the Bell companies, the cable industry responded to the deregulation of the 1996 Telecom Act and vibrant DBS competition by investing $100 billion in private risk capital to upgrade its facilities with state of the art fiber optic technology. The industry made this investment without government subsidies and with no guarantee of a return on its investment. And just like it created a multichannel video service from scratch, cable pioneered the residential broadband marketplace, while the telephone companies kept DSL technology on the shelf in order to preserve their high priced T1 business service. Cable's innovation and risk taking created the nation's largest broadband provider of high speed Internet access. Cable's broadband platform delivers digital video, high definition television, digital telephone service, and an array of new interactive services.

The Existing Franchise Process Is Not a Barrier to Entry

Despite a promise ten years ago that they would compete in video, the Bells are back, smaller in number but much larger in size with annual revenues of $150 billion more than twice that of the cable industry, telling Congress that they can't compete in video, in fact won't compete in video unless they are granted another special favor. They want to enter the video business on favored terms without obtaining a local franchise agreement.

The Bells complain that the franchising process is a barrier to entry and that it takes too long to obtain franchise agreements. An examination of the facts shows that those claims are simply unfounded.

Telephone companies – and other new video entrants – have long received local cable franchises. Shortly after Congress repealed the ban on telephone companies entering the video business, Ameritech obtained more than one hundred cable franchises. Ameritech did not waste time complaining about or seeking to avoid the franchising process. It simply went about obtaining cable franchises and it did so without resistance, unreasonable demands or delays by local franchising authorities. Ameritech's rapid progress in obtaining franchises continued until the company was acquired by SBC, which promptly sold off Ameritech's systems just as it terminated the efforts of Pacific Telesis and Southern New England Telephone to offer competitive cable service after acquiring those companies.

Smaller broadband competitors with a fraction of the Bells' resources like WideOpenWest, Knology and RCN have managed to obtain franchises to compete with cable companies in hundreds of communities across America. And it looks like the telephone companies are managing to do so, too.

Verizon CEO Ivan Seidenberg told investors in a January conference call that his company was making "good progress" on video franchising and that the franchising process does not pose "any impediment to our rolling out FiOS during the year 2006."[1] As he explained to *Business Week*, "We haven't been turned down anywhere we've gone."[2]

And he's right. Verizon already has franchises covering approximately two million households, and there are many examples of Verizon obtaining approval in as little as 19 days to 4 months (Beaumont, California; Sachse, Texas; Herndon and Fairfax County, VA). In fact, in several instances Verizon has obtained franchise agreements faster than they are able to deliver service. For example:

- In Sachse, Texas, Verizon obtained a franchise in less than two months but took over a year to deploy video after being granted a franchise on December 6, 2004.
- In Fairfax County, Virginia, Verizon obtained a franchise in less than 3 months, but it took more than 5 months after receiving the franchise before it began offering video service in that community.
- In Beaumont, California, where Verizon obtained a franchise in less than 3 weeks, it did not begin to offer video service until more than 15 months after it was granted a franchise.
- In Bellefonte, Delaware, where Verizon obtained a franchise in less than 50 days, it still does not offer video service more than 3 1/2 months later.

Ironically, some local governments complain that Verizon is actually responsible for delays in the franchising process. Several counties in Maryland have told the FCC that Verizon's own internal bureaucratic machinery creates substantial delay and has significantly contributed to much of the regulatory lag about which Verizon complains.

The bottom line: a review of Verizon's franchises shows an average of 4.3 months to obtain a franchise, and interestingly, an average of 5.3 months after they get a franchise before they deliver video service.

Most interestingly of all, AT&T can make no legitimate complaints about the franchising process at all because they, wrongly, assert that their video service does not require them even to comply with federal franchising rules. In other words, they haven't even tried.

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[1] Conference Call Transcript, VZ-Q4 2005 Verizon Earning Conference Call, Jan. 26, 2006.
[2] Business Week Online, Sep. 28, 2005, "Verizon: "We've Got to Fix It".

What the Bells Truly Seek Is a Green Light to Serve Only "High Value" Consumers

So the Bells' complaints about process are nothing more than a smokescreen to hide the fact that what they really seek is to avoid the obligations that come with obtaining a video franchise.

Specifically, what the Bell monopolies refuse to accept is the notion that the new competition they promise should be afforded to all of the communities they serve. It's really that simple. Having built their networks on the backs of ratepayers as a regulated monopoly for nearly a century, the Bells do not believe that they should be required to *upgrade those* networks in a manner that is equitable and nondiscriminatory.

The Bells are making the case that their video service will bring widespread benefits to consumers while, at the same time, telling Congress that they should not be required to provide such service to all communities within their service area. For example, SBC (now AT&T) has announced to Wall Street that it would serve 90% of "high-value" customers, 70% of "medium-value" customers, and only 5% of what they deem to be "low-value" customers.3

Ironically, in the past the Bells attacked voice competitors for the same type of cherry-picking they now want to practice as they enter the video business. SBC paid for advertising in major newspapers criticizing competitors who wanted to selectively target their customers. "*We proudly make SBC service available to everyone, in every neighborhood, in every region we serve,"* the SBC ads declared. SBC should have added a disclaimer: "But when it comes to video, we're not interested in serving 'low-value' customers."

If Congress believes that increased video competition is an important public policy, then it must confront how to ensure that the benefits of competition are made available to all citizens. Otherwise, the Congressional goal of promoting widespread deployment of advanced broadband services to all Americans will never be achieved and households in urban and rural America will be relegated to second-class service.

The Committee Print is a Significant Step Forward

The committee print under consideration today represents a significant step forward. Unlike previous drafts, the bill does not grant regulatory relief based on the technology used to offer video service. And the current proposal does not include new regulations on video services.

As we have stated, we believe the better course is to reform and streamline the existing franchising process; however, we strongly support the policy decision reflected in the bill to seek to ensure a level playing field for video competition. While we can continue to debate the rules upon which new entrants offer video services, it is critical to ensure that all competitors compete under the same rules. There are also a number of areas where we believe the level playing field provisions of the Committee Print can be strengthened and clarified. Giving all providers of video services the ability to compete on a level playing field ensures that the marketplace rather than the government will choose winners and losers. Competitors will have the freedom to innovate and make business decisions based on marketplace realities rather than the vagaries of a skewed regulatory framework.

A level playing field also creates a predictable and stable regulatory environment which is crucial for continued investment and innovation. In testimony before the Senate Commerce Committee on March 14, 2006, Aryeh B. Bourkoff (senior analyst at UBS Investment Research) said regarding franchise reform, "I stress the importance of maintaining a level playing field among all operators while allowing consumer preferences to dictate the changes to current models. Uncertainly among investors will

[3] SBC Project Lightspeed Investor Relations Call, Nov. 11, 2004

persist if the rules surrounding obtaining a video franchise fluctuate based on the nature of the new entrants."

Establishing a level playing field for video competition should be welcomed by the Bell companies who have argued for years that they should operate under the same regulatory framework as cable operators in the provision of high speed Internet access. AT&T said it best in comparing the regulatory treatment of cable modem and DSL service, "companies that provide similar services should be regulated the same. There is no reason for treating them any differently."4

Rights and Obligations of VoIP Providers

We are pleased that the Committee Print includes language that seeks to clarify that the interconnection rights Congress established in 1996 to promote voice competition apply to all providers of voice services on a technology neutral basis. The 1996 Telecom Act provided interconnection rights to competitive local exchange carriers (CLECs) so they could exchange traffic with the Bells on an economic basis, without glitches or delays, in order to promote local voice competition. Limiting interconnection and related rights to providers of voice services using traditional technology would ensure the Bells retain their market dominance by hampering the introduction of digital voice services – the best hope for competition in the voice market. The bill correctly recognizes that any legislation to promote competition would be incomplete without addressing voice competition where the Bell companies still control 85% of the market.

Network Neutrality Regulation Threatens Continued Investment

We are concerned, however, that the committee print would, for the first time, impose regulation on the Internet. While simply codifying the FCC's network neutrality principles may, at first blush, look like a reasonable and innocuous attempt to ensure that network providers maintain openness; it could lead to endless and expensive litigation.

With bandwidth usage growing at a rapid pace, continued investment will be needed to keep broadband services robust. If broadband providers are to continue to make these investments, and if consumers are going to be given the levels of services and innovative new products and features they desire, all at prices they can afford, broadband providers need to have continuing flexibility to develop new business models and pricing plans. Network neutrality rules will stifle that flexibility and discourage capital investment.

The marketplace is highly competitive, where no real world problems needing a solution have been identified, and where the pace of technological development is breathtaking. There can be no better circumstances than these to leave regulation to the marketplace rather than government.

Practical Issues Raised by the Committee Print

While we have only had a few days to review the draft bill, we have identified a number of practical issues that would create uncertainty and ambiguity and frustrate the stated objective of replacing local franchising with a national scheme. We describe these issues below. They include the limitations imposed on the availability of a national franchise for incumbent cable operators, but the problems are by no means limited to that section of the bill. At a minimum, these issues should be resolved before the bill moves forward.

Clarifying that All Providers Are Covered. While the draft bill establishes a national franchise to enable faster entry by "new cable providers" and appears intended to capture video services provided by the telephone companies, the failure of the bill to amend the definitions of cable service or cable system undermines this purpose. AT&T

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[4] Press Release, SBC Communications, Inc., "SBC Urges FCC To Enact Regulatory Parity For Broadband, "Aug. 6, 2002.

has argued extensively that its proposed service does not fall within the existing statutory definitions because it has incorporated IP technology into its delivery system, and that therefore it should not be subject to any franchise requirements. Nothing in the draft bill precludes AT&T from continuing to assert this position. While we believe AT&T's argument is meritless, Congress should use this opportunity to remove any ambiguity. Not to do so would abdicate to the FCC and the courts the fundamental question of whether this bill even applies to AT&T and other "IPTV" providers which, of course, could easily include cable operators. One could reasonably ask what the point of this bill is in such a circumstance.

Ensuring A Level Playing Field. While the bill clearly seeks to establish a national franchising scheme allowing all providers to compete on a level playing field, in fact it creates a complicated structure in which providers offer cable service pursuant to a hodgepodge of national, state, and local franchises. It is, in short, a recipe for confusion. For instance, whether an existing cable operator is eligible for a national franchise is wholly out of its hands. Instead, it depends on the decisions and even the identity of its video competitor. In "franchise areas" that are unserved by a "new operator" on the date of enactment, for instance, an incumbent operator is ineligible for a national franchise unless and until a new operator "is providing service under a national franchise." Thus:

- No new entrant; no national franchise for the incumbent operator.
- New entrant elects a local franchise; no national franchise for the incumbent operator.
- New entrant obtains a national franchise; no national franchise for the incumbent operator until the new entrant actually starts providing service.
- New entrant's "franchise area" covers only a portion of the incumbent operator's service area; unclear whether operator can obtain a national franchise for its entire service area.

In areas where an incumbent local exchange carrier is already providing service on the date of enactment in competition with an existing cable operator, *neither* is eligible for a national franchise. Each must wait until its current franchise is no longer in effect until it can obtain a national franchise -- and then can only do so if the other provider is still providing service in that area. This means that a cable operator can be locked into a municipal franchise for years while a telephone company operates under a more favorable state franchise, and then, when it is finally eligible for a national franchise, its ability to obtain one is dependent on the decision of the telephone company to remain in the market.

Oddly, too, the bill does not even ensure that both providers are eligible for a national franchise at the same time. Where the telephone companies have negotiated franchises that allow them to walk away from the agreement in only a few years, they will be able to terminate such franchises and enjoy the benefits of a single, national franchise long before cable operators are eligible to request one.

All providers must be able to predict their regulatory environment with more certainty in order to continue investing in the market. If the policy objective is a national franchise, then that objective should be available to all providers under the same terms and conditions. At a minimum, the regulatory status of one provider should not be dependent on the business decisions of a competitor.

"Snapback" Provision. Related uncertainty is created by the provision that automatically terminates an incumbent operator's national franchise in any franchise area where there is no competing cable operator for one year. Upon termination, the operator is left with no continuing authorization to provide service. The operator may obtain a new local franchise, but getting one is not automatic and the terms of the new local franchise are not established by the bill. Again, the operator's fate is dictated by the actions of its competitor. If the competitor pulls out of a market, the operator must apparently start

from scratch to negotiate a new franchise with the local franchising authority. This entire section is absurd and should be deleted.

No Meaningful Anti-Redlining. While the bill would prohibit a national franchisee from denying service to residential subscribers on the basis of income, it essentially allows a franchisee to self-define the "franchise areas" it will serve. A prohibition on redlining is essentially meaningless if a franchisee can simply limit its rollouts to wealthier communities or even neighborhoods. At a minimum, a "franchise area" should be defined as co-extensive with existing political subdivisions to limit the opportunity for the most blatant cherry-picking.

The bill also undermines the redlining prohibition by moving responsibility for oversight of this requirement from localities to the FCC. Nondiscrimination is most effectively overseen and enforced by local officials who know their community best, not by the FCC. Further, the FCC is directed only to ensure that the cable operator extends access to the avoided group; a national franchisee violating the anti-redlining requirement faces no penalty for its discrimination and is not required to make service available within any particular time limit. Even though a nationwide franchise is the chosen method to ensure competitive entry, it is still important to preserve local input into that process. Localities are best positioned to determine whether deployment comports with anti-redlining rules.

Large Increase in Fees. The bill substantially increases the fees paid by cable operators. First, the bill codifies an expansive definition of the "gross revenue" on which franchise fees are based, including revenues from advertising and promotional support. Second, all national franchisees would be required to pay up to an additional 1 percent of gross revenues to support PEG programming and institutional networks. This obligation would fall disproportionately on an existing cable operator which obtains a national franchise -- first, since 1 percent of its revenues would far exceed 1 percent of a new entrant's, and second, because the existing operator would also have to continue to provide -- apparently in perpetuity -- any institutional network that was required under its superseded local franchise. By contrast, local franchising authorities are expressly barred from requiring other national franchisees from constructing such networks.

Finally, in addition to requiring national franchisees to pay 6 percent of gross revenues -- and forcing existing operators to continue to provide institutional networks -- the bill authorizes new "rights-of-way management" fees. The intent may be to limit these fees to management-type activities such as permitting, inspection, etc., but unless the bill specifies that these fees must be "cost-based," there will inevitably be litigation -- as there as been over the provision in the 1996 Act authorizing "fair and reasonable," rather than "cost-based," rights-of-way compensation -- over whether this provision authorizes localities to collect market-based rents. The bill should impose clear limits on the fees imposed on all providers, if we are to continue innovating and offering consumers new services and products. The bottom line is that the bill represents an increased tax on consumers for no additional benefits and should be substantially modified and reduced.

Consumer Protection Requirements. The bill authorizes local franchising authorities to enforce the FCC's cable consumer protection rules, permitting them to issue orders requiring compliance with such rules. What the bill doesn't say is how a locality would enforce such an order. Would it be able to impose a fine? Would it be able to take an operator to state court, leading inevitably to a plethora of inconsistent interpretations of the FCC's rules? In the absence of further guidance, the objective of a nationally consistent set of consumer protection rules will be undermined.

Net Neutrality. I have already explained our strong reservations about codifying the FCC's principles as binding requirements, enforceable by the Commission. Here I would only observe that the adjudication authorized by this section of the bill is without reference to any procedural safeguards, such as those applicable to cease-and-desist

orders against broadcasters under section 312(b) of the Act or the imposition of forfeitures under section 503(b)(4).

Interconnection. We recognize and applaud the bill's inclusion of a provision to make sections 251 and 252 of the 1996 Act applicable on a technology-neutral basis to competitive voice providers using IP technology. It is a step in the right direction, but what it gives with one hand it may take away with the other. IP-voice providers get the rights and duties of a competitive local exchange carrier (CLEC) under sections 251 and 252 of the Communications Act -- but only "with respect to interconnection" and "associated" rights and duties "necessary to effectuate interconnection." Since these sections address more than just interconnection, such as numbering, access to unbundled elements of the incumbent's network, and collocation at incumbent central office, IP-voice providers effectively have fewer rights than what CLECs presently have. Moreover, the language invites years of disputes over which parts of sections 251 and 252 are "necessary" to "effectuate" interconnection.

The bill also misses an opportunity to resolve the disputes pending in a growing number of states between rural carriers and CLECs over whether the latter can use their interconnection agreements in the provision of wholesale telecommunications service to IP-voice providers. While we are hopeful the FCC will address this issue, Congress can cut years off the process and provide needed certainty by clarifying the issue in law rather than also abdicating this issue to the agency and the courts.

Municipal Broadband. The bill would overturn laws in over a dozen states that limit municipalities from constructing and operating broadband networks. These states have made the judgment that the risks to taxpayers outweigh any putative benefits of letting local governments enter this risky and competitive industry. The 1996 Act was successful in promoting substantial private sector investment in broadband facilities. The cable industry alone has invested nearly $100 billion since 1996. Government-provided service in areas served by private enterprise will impose substantial burdens on taxpayers and undermine competition from non-government providers who must rely on risk capital.

At a minimum, municipal broadband should be limited to areas where the private sector does not or is not likely to serve. To oversee their entry into broadband, governments should have to establish entities separate from the agencies that regulate communications providers in order to avoid conflicts of interests. Finally, the possibility of cross-subsidization through a wide range of devices, from tax revenues to below-cost loans relying on government borrowing power to discriminatory access to poles and conduits that are exempt from the Pole Attachment Act, demand more specific safeguards than the general language contained in the bill.

Conclusion

As Congress drafts changes to the Telecommunications Act of 1996, we urge you to treat like services alike, preferably in a deregulatory environment. We will do the rest by raising private risk capital, investing in new technology, offering better customer service, creating innovative new programming, and competing with other multichannel video providers in order to provide consumers with the best voice, video, and data services possible.

MR. WALDEN. Thank you, Mr. McSlarrow. Mr. Regan, welcome. We look forward to your comments, sir.

MR. REGAN. Thank you, Mr. Chairman. Mr. Chairman, I am here on behalf of Corning Incorporated, as well as the Telecommunications Industry Association. At the outset I would really like to thank you and thank the members of this committee, and I am sure few people come

here to thank you but I am here to thank you. I am here to thank you for your leadership on all the broadband issues.

As you know, the entire telecom equipment industry has been through some very, very difficult times. Over the last year after the telecom meltdown, Corning had to lay off thousands and thousands of people. We had six fiberoptic plants. We have one left today. And I am pleased to say because of the leadership of the members of this committee, we now find ourselves in the situation where we are actually hiring people again. Folks at this table are buying fiberoptics once again and I am pleased to say that since the TRO went into effect, we have added about 700 people. So it is great to be on the other side for a while adding people.

We approach the telecom issues from a narrow perspective. The question for us is really what is going to stimulate investment in new network technologies, create facilities-based competition in the interests of both consumers and producers. We step back, we sort of see this thing in terms of two technology shifts that are underway. The first technology shift was from dial-up access to current generation broadband. It has about a 20-fold increase in capacity. And the next generation is from current to next and that is another 20 fold. So let me talk about it in terms of a highway. It is like taking 95 from two lanes to 40 lanes and then taking it yet again from 40 to 800. This is pretty significant.

Now, the good news is, the first shift is under way. Today in America, we now have about 40 million people hooked up to the Internet using current-generation broadband capability. That is up from five million, about an eightfold increase since the year 2000. And the thing that drove this--there are a lot of things--but two things that Government has control over are pro-competitive deregulatory policies, and those are the things that have helped drive this investment. In the case of fiberoptics, we have seen fiber to the prime increase in terms of home pass by over 15,000 percent in the case of homes served by over 10,000. Admittedly, they are over small bases. Now, the second broadband technology shift is just underway. Currently, there are about one-half of one percent of Americans getting Internet access over next-generation capability. This is a very immature industry. So the next step really is to promote competition through streamlined entry into the video domain. Video is the applications driver for the next-generation capability. High-definition bandwidth uses 150 times more bandwidth capacity than dial-up Internet access. So, it is a huge step forward. Now, we studied the impact of franchising with respect to our narrow slice in the world and that is the narrow slice of fiber to the home or fiber to the prime. We have discovered that there are three changes that could make a

significant difference in employment. One is speed of entry, critically important as people move into the triple-play market. The second thing is to avoid unreasonable build-out requirements, and the third thing is to avoid and limit these extraneous obligations that creep into these negotiations. Now, we think that your bill really makes a strive at getting all three things and we applaud that.

The second thing that is important is to promote more competition and that gets us into the question of municipal entry. Now, muni's were one of the first early adopters for fiber to the home. It is hard to believe but they were. Now the courts have blocked that. This bill fixes that and we encourage that. Significantly, this bill also provides some level of parity, in that it gives cable companies the same treatment as telephone companies in competitive markets. We think that it is a good idea.

And finally, I would like to raise a flag of caution with regard to the question of net neutrality. Now, it appears to us that consumers are being protected today with respect to current generation broadband capability with a set of connectivity principles that really came out of the technology community. We developed these and proposed them to the FCC during the TRO and the FCC has seen light to put those into effect, and our friends in the carrier community have all endorsed them. Now, a lot of questions have been raised about another set of problems and we are concerned about those problems. We are concerned about those problems because building these networks is going rough. If you take a look at the stocks of the companies that are stepping up, Wall Street is not rewarding them for making those investments. In fact, you will see that with respect to fiber to the prim, Verizon, you know, has been criticized for making these kind of investments. I know that they are big companies and everybody said they can absorb these kinds of problems, but the fact remains that it is tough for these companies to do this and to satisfy their shareholders, so we would encourage you to move very carefully into this space to avoid unintended consequences.

Thank you, Mr. Chairman. You are on the right track. We encourage you to proceed.

[The prepared statement of Timothy Regan follows:]

PREPARED TESTIMONY OF TIMOTHY REGAN, SENIOR VICE PRESIDENT, GLOBAL GOVERNMENT AFFAIRS, CORNING INCORPORATED.

Summary of Testimony of Timothy J. Regan

We approach telecom policy from a very simple perspective. The question for us is: What policies will facilitate investment in network technologies to promote facilities-based competition in the interest of both producers and consumers alike?

We believe that there are two technology shifts occurring in the broadband space.

The first broadband technology shift is from dial-up Internet access to current generation broadband access. This is characterized as a shift from 56 Kbps narrowband Internet access to 1.5 Mbps broadband Internet access – about a 20-fold expansion in capacity.

The second broadband technology shift from current generation to next generation broadband is characterized by yet another 20-fold increase in Internet capacity from 1.5 Mbps to around 25 or 30 Mbps.

The very good news is that the first shift is well on its way thanks to Congressional and FCC leadership. Deployment of current generation broadband in terms of subscribership has grown from five million subscribers in the year 2000 to nearly 40 million last year, an 8-fold increase. Pro-competitive and deregulatory policies have facilitated this transition.

The second broadband technology shift is just beginning. Only 0.5% of American households have access to next generation broadband.

Congress now must decide whether it wants to facilitate investment in next generation broadband capability. If so, we recommend that Congress build on its past success by pursuing a pro-competitive, deregulatory agenda in the future.

Promoting competition through deregulation in the video realm is the next logical step. The draft bill before you does this by vastly streamlining the franchising process. The draft bill also promotes competition by providing the necessary statutory clarification to allow municipal entry.

Finally, we raise the flag of caution on the net neutrality issue because the problem we are trying to solve is not obvious. And, serious negative consequences on network investment could arise if the wrong action is taken.

Mr. Chairman, I'm pleased to accept your invitation to testify today on behalf of both Corning Incorporated and the Telecommunications Industry Association.

As you know, Corning is the inventor of low-loss optical fiber. In fact, your former colleague in the House of Representatives, Amo Houghton, should be properly identified as one of the fathers of fiber optics. He was at the helm of Corning at the time optical fiber was invented, and he invested hundreds of millions of dollars to prove to the world that data can be transmitted over extremely long distances using glass fibers as thin as hair.

Corning is also a member of the Telecommunications Industry Association. TIA provides a forum for over 600 member companies, the manufacturers and suppliers of products, and services used in global communications. Many TIA members manufacture and supply products and services used in the deployment of the broadband infrastructure that enables the distribution of video programming. Because video programming and the franchise process is the core of the proposed legislation, my testimony today focuses on TIA's interest in this area.

We approach telecommunications policy from a very simple perspective. The question for us is: What policies will facilitate investment in network technologies to promote facilities-based competition in the interest of both producers and consumers?

Contrary to popular view, we do not see the issue before Congress as a matter of choosing sides among the titans. Rather, we see the challenge as one of encouraging and allowing all parties to do their part in developing the most robust broadband communications network in the world. That is the outcome that will provide the greatest benefit to all Americans.

<u>The First and Second Broadband Technology Shifts</u>

With that in mind, we think it is helpful to review the recent history of broadband technology. Essentially, we believe there are two technology shifts occurring in broadband.

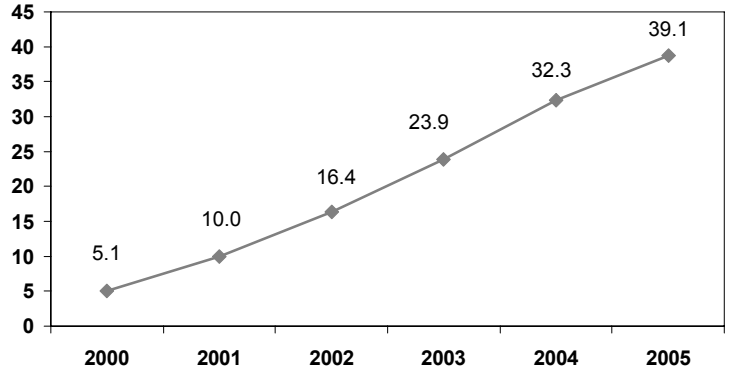
The first broadband technology shift is from dial-up Internet access to current-generation broadband access. This is characterized as a shift from 56 kilobit-per-second narrowband capability to around 1.5 megabit-per-second ("Mbps") broadband capability – roughly a 20-fold capacity expansion.

The second broadband technology shift is from current-generation to next-generation broadband access, characterized by yet another 20-fold capacity, from 1.5 Mbps to as much as 25-30 Mbps.

To give you an example of the effect of these two shifts, let me use the analogy of a highway. The first broadband technology shift is like going from a two-lane highway to 40-lane highway. The second shift is like from going from 40 lanes to 800 lanes. Just imagine I-95 going from 2 to 40 to 800 lanes.

The good news is that the first shift is well on its way. Progress in technology deployment is often measured by the substitution of the new for the old. By this measurement tremendous progress has been made in the deployment of broadband, where subscribership increased by more than 700% from 5.1 million in 2000 to 39.1 million in 2005, while dial-up subscribership peaked at 47.3 million in 2002 and has since declined to about 40 million subscribers, the level that existed in 2000.[1]

U.S. Current Generation Broadband Subscribers
(in Millions)



Source: In-Stat/MDR, FCC, TIA, Wilkofsky Gruen Associates

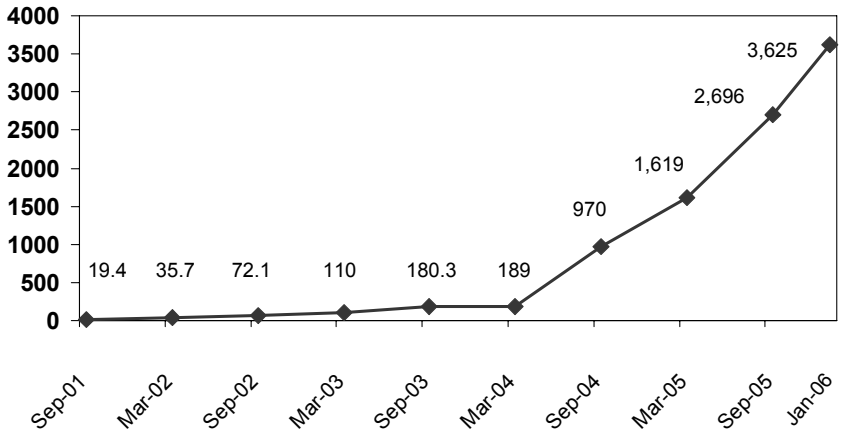
The second broadband technology shift has just begun and involves a number of different technologies, including fiber to the premises (FTTP), fiber to the node (FTTN), fiber to the curb (FTTC), VDSL, DOCSIS 2x and DOCSIS 3.0, satellite and various wireless technologies, all of which hold great promise and are in various stages of development and deployment.

Although TIA companies are involved in all of these technologies, I am most familiar with FTTP and will confine my remarks regarding the second broadband shift to that technology. With respect to FTTP, the second stage shift, although in its infancy, has been profound. From September 2001 to January 2006, FTTP deployment increased from 19,400 homes passed to 3.6 million homes passed, an 18,500 % increase in four

[1] *See* Telecommunications Industry Association , *Telecommunications Market Review and Forecast,* 2005.

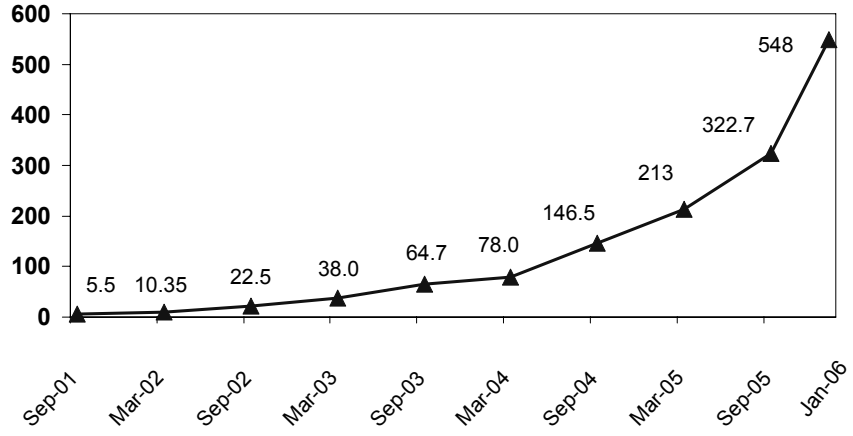
years. FTTP subscribership increased from 5,500 in September 2001 to 548,000 in January 2006, a 10,000% increase over four years.[2]

FTTH Homes Passed
(Cumulative—North America)
in Thousands



Source: RVA Research

FTTH Homes Connected
(Cumulative—North America)
in Thousands



Source: RVA Research

[2] *See* RVA Research, *FTTH/FTTP Update*, Jan. 2006.

While Verizon accounts for much of the FTTP deployment in volume, the FTTP experience is broadly based. As of October 2005, FTTP had been deployed in 652 communities across 46 states, with only 34% of those communities served by Verizon.[3]

The Importance of Pro-Competitive, Deregulatory Telecommunications Policy

The first broadband technology shift was driven by four forces: competition, deregulation, consumer demand for bandwidth, and technology advancement. The federal government played a positive and significant role in the first two of those factors – competition and deregulation. House passage of the Tauzin-Dingell bill[4] in February 2002 spurred three major decisions by the FCC which created a favorable environment for broadband investment: the cable modem decision of 2002[5], the Triennial Review Order of 2003[6], and, most recently, the DSL decision of 2005[7]. Thus, the pro-competitive, deregulatory actions taken by this body and by the Commission have worked to encourage the first broadband technology shift.

To best facilitate the second technology shift, Congress should continue its pro-competitive, deregulatory stance. And indeed, Congress has already taken steps in this direction. Most recently, with leadership from this Committee, Congress adopted a "hard date" for the DTV transition[8] which will release prime spectrum for the development of new wireless solutions. Congress has also encouraged the FCC to facilitate competition in the wireline voice market by applying the light hand of regulation for VoIP, which will enable cable companies and new entrants to compete with incumbent telephone companies.[9]

Promoting competition through deregulation in the video realm is the next logical step. Video is the application driver for the deployment of next generation broadband because video uses an enormous amount of bandwidth. Even with the latest compression techniques, a high definition television signal uses approximately 8 to 9 Mbps, several times faster than current-generation broadband. Therefore, a public policy facilitating entry of new video providers will result in the deployment of more robust infrastructure, increased competition and consequent consumer benefit.

Specific Problems With The Current Video Franchise Process

Problem 1: Delay

Unfortunately, the current video franchise process does not facilitate the entry of new video providers in a timely fashion. The franchise-by-franchise negotiation process established under the old monopoly framework is simply too slow and unwieldy to encourage the speedy entry of new providers. Verizon has filed documents with the FCC establishing that, to serve its entire target area with video service, it must negotiate between 2,000 and 3,500 franchises, excluding those in Texas.[10] Verizon began negotiations with 320 franchise authorities in November 2004 and, as of February 2005,

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[3] *See* RVA Research, *FTTH/FTTP Update*, Oct. 2005.

[4] *See* United States. Cong. House of Representatives. Internet Freedom and Broadband Deployment Act of 2001. 107th Cong. H.R. 1542. Washington: GPO, 2001.

[5] *See* FCC GN Docket No. 00-185, CS Docket No. 02-52, (rel. March 15, 2002).

[6] *See* FCC CC Docket No. 01-338, (rel. Aug. 21, 2003).

[7] *See* FCC CC Docket No. 02-33. (rel. Sept. 23, 2005).

[8] *See* Deficit Reduction Act of 2005, Pub. L. no. 109-171, Title III Digital Television Transition and Public Safety.

[9] *See* FCC CC Docket No. 04-267. (adopted Nov. 9, 2004).

[10] *See* FCC MB Docket No. 05-311, *Comments of Verizon on Video Franchising,* Feb 13, 2006, Attachment A at 5.

had only 26 franchises other than those that were automatically issued in Texas.[11] For those franchises that have been successfully negotiated, negotiation time has ranged between two months and 17 months, with an average of 7.65 months.[12] The more important focus, however, are the negotiations in which Verizon has *not* been successful: in over 80% of the franchise negotiations Verizon initiated in November 2004, a franchise still has not been granted.[13]

A similar situation has been experienced by BellSouth, which needs to negotiate 1,000 franchises. As of last month, it had received only 20 franchises, requiring between 1.5 months and 32 months of negotiation time for each, at an average of 10 months.[14]

Moreover, this is not just a problem for the Regional Bell Operating Companies. Smaller companies such as Knology, Grande Communications, Guadeloupe Valley Telecommunications Cooperative and the Merton Group have all reported a similarly protracted period of franchise negotiations, ranging between 9 months and 30 months.[15]

The delayed entry of these competitive video providers results in less competition, less consumer welfare benefit, and delay in the second broadband technology shift.

Problem 2: Build Out

The second major problem with the current video franchise process is the practice of requiring new entrants to build out facilities beyond the area which they find economical. For example, in the case of a telephone company entering the video market, video deployment logically follows the existing wire center footprint, which typically does not follow franchise area boundaries.[16] If a telephone company wants to offer video service throughout a wire center which covers, say, 30% of a local franchise area, the requirement to build out to the entire franchise area might well make it economically infeasible to provide video service *at all* within that franchise area.

This is not merely a whimsical example. We recently analyzed telephone company wire centers in Texas – where the characteristics of wire center deployment are typical of the nation on average – and found that only 3% of the wire centers completely overlap the geographic area of franchise areas.

Therefore, the requirement that new entrants build out to an entire franchise area will result, in many instances, in potential competitors delaying or even abandoning plans to enter new video markets.

Again, this is not just a Bell Company problem. The National Telecommunications Cooperative Association has reported that many of its members, which tend to be small rural telephone companies, want to get into the cable business but have reported problems with local franchising authorities – particularly unreasonably short build out periods or requirements to build outside the carrier's own service territory.[17]

The solution, we believe, is to establish a franchise process which does not require such counterproductive build out requirements.

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[11] *See* FCC MB Docket No. 05-311, *Comments of Verizon on Video Franchising*, Feb 13, 2006, Attachment A at 4.

[12] *See* FCC MB Docket No. 05-311, Comments of Verizon on Video Franchising, Feb 13, 2006, Attachment A, Exhibit 1.

[13] *See supra footnote 11.*

[14] *See* FCC MB Docket No. 05-311, *Comments of BellSouth Corporation and BellSouth Entertainment,* LLC, Feb. 13, 2006, at 10, 11.

[15] *See* FCC MB Docket No. 05-311, *Comments of the Fiber-to-the-Home Council,* Declarations of Felix Boccucci, Andy Sarwal, Jeff Mnick, Terrence McGarty.

[16] *See* FCC MB Docket No. 05-311, *Comments of Verizon on Video Franchising,* Feb. 13, 2006, at 40.

[17] *See* FCC MB Docket No. 05-311, *Comments of the National Telecommunications Cooperative Association,* Feb. 13, 2006, at 4,5.

Problem 3: Extraneous Obligations

The third major problem with the current video franchise process is the imposition of extraneous obligations that exceed 1% of revenues.

The Congress has already indicated its intent to limit payments for franchises by establishing in Title VI of the Communications Act that the 5% statutory franchise fee is a ceiling for payments "of any kind".[18] Yet, franchise authorities often seek payments that far exceed the 5% fee by imposing requirements like the assumption of all Public, Education and Government (PEG) costs incurred by the incumbent cable operator over the entire span of its service, the installation of institutional networks (I-Nets), the requirement to bury aerial plant, the assumption of applications and acceptance fees, etc.[19] These extraneous requirements increase costs and discourage the investment in next-generation broadband capability thereby delaying the second technology shift. The solution, we believe, is to prohibit the imposition of extraneous cost beyond 1% of gross revenues.

Treatment of Existing Video Providers

We are also pleased that the draft bill would make its national franchise available to existing cable TV providers in competitive markets. We think this is very important in order to encourage investment by all providers and to spur healthy competition.

Municipal Broadband

To promote competition, Congress also should enable municipalities to deploy next generation broadband capability. Particularly regarding fiber to the premises, municipalities were among the early leaders, even though recent court decisions have slowed deployments in a number of states. Although we believe municipalities should consider all options before entering the telecom field, if municipal leaders feel that they must build their own networks in order to provide satisfactory broadband services to their constituents, they should have the freedom to make that decision. The draft bill before you includes the necessary statutory clarification to allow municipal entry.

Net Neutrality

Finally, Congress should avoid taking action which could, in fact, do harm. This principle must be applied to the issue which has gained a tremendous amount of attention of late – the so-called "net neutrality" issue.

Clearly, consumers buying broadband access from any provider should get the capacity they purchase, it should not be blocked, and they should be able to connect devices of their choosing, provided such devices do no harm to the network. These principles were originally proposed by the High-Tech Broadband Coalition (HTBC), with the participation of TIA, and were adopted by the FCC last year. TIA recently released its *Broadband Internet Access Connectivity Principles*, which reaffirms and adds to the abovementioned principles. We attach a copy hereto for your use.

Similarly, unaffiliated applications developers, as consumers of bandwidth, should have rights, as well. They, too, should be able to use the bandwidth they purchase without being blocked. However, we have yet to see significant evidence of an actual problem. Rather, net neutrality advocates appear to be concerned about potential misdeeds rather than actual misdeeds.

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[18] *See* U.S.C. Sec. 542(g)(1).

[19] *See* FCC MB Docket No. 05-311, *Comments of Verizon on Video Franchising,* Feb. 13, 2006, at 57-75.

Conclusion

We feel that it is crucial for the Congress to continue the string of pro-competitive, deregulatory federal policy actions that have occurred regarding telecommunications since 2002. The draft legislation now under consideration by this Committee follows in that vein. We believe this constitutes good public policy because it will: 1) help meet consumer demand for bandwidth; 2) enhance consumer welfare through price competition; 3) increase investment; 4) increase jobs; and 5) enhance American competitiveness. We are pleased to give it our support.

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Broadband Internet Access Connectivity Principles

TIA has long supported the rights of broadband Internet access service consumers to connect to and utilize their choice of legal Internet content, applications and devices, while also recognizing the needs of service providers in a competitive market to manage the security and functionality of their networks. TIA reaffirms its pro-consumer principles, as outlined below, while continuing to observe that currently no significant evidence exists of these principles being abused in the marketplace. As such, it is not now necessary for the Federal Communications Commission to promulgate detailed rules in this area. Rather, the FCC should address any such problems on a case-by-case basis in the event they arise.

1. A competitive broadband Internet access market offers consumers choices with respect to "connectivity" – that is, the ability to access any lawful Internet content, and use any device, application, or service over the public Internet – so long as they do not harm the network. In particular:

   1.1. Consumers should receive meaningful information regarding their broadband Internet access service plans.

   1.2. Broadband Internet access consumers should have access to their choice of legal Internet content within the bandwidth limits and quality of service of their service plan.

   1.3. Broadband Internet access consumers should be able to run applications of their choice, within the bandwidth limits and quality of service of their service plans, as long as they do not harm the provider's network.

   1.4. Consumers should be permitted to attach any devices they choose to their broadband Internet access connection, so long as they operate within the bandwidth limits and quality of service of their service plans and do not harm the provider's network or enable theft of services.

2. A competitive broadband Internet access market also gives facilities-based broadband Internet access providers competitive incentives to undertake risky, new investments, while precluding anticompetitive behavior against unaffiliated businesses. In particular:

   2.1. Broadband Internet access service providers should remain free to engage in pro-competitive network management techniques to alleviate congestion, ameliorate capacity constraints, and enable new services, consistent with the technical characteristics and requirements of the particular broadband platform.

2.2. Broadband Internet access service providers should remain free to offer additional services to supplement broadband Internet access, including speed tiers, quality of service tiers, security and spam services, network management services, as well as to enter into commercially negotiated agreements with unaffiliated parties for the provision of such additional services.

2.3. Such network management tools would enable operators to continue to optimize network efficiency, enable new services, and create incentives for continued build-out to meet increasing capacity demands.

2.4. Broadband service providers should also remain free to innovate in the deployment of managed services, such as packaged video programming, which utilize the same networks but are distinct from public Internet access services.

TIA believes that the FCC has jurisdiction to vigilantly monitor the broadband Internet access service market and expeditiously review any complaint of anticompetitive activity. However, as no significant evidence of a problem exists at this time, it is not now necessary for the FCC to promulgate detailed rules in this area. Rather, the FCC should address any such problems on a case-by-case basis in the event they arise.

MR. WALDEN. Thank you, Mr. Regan. Mr. Misener, welcome. We look forward to your comments today, sir.

MR. MISENER. Thank you very much, Mr. Chairman, and thank you for inviting Amazon.com to testify.

Mr. Chairman, the phone and cable companies are going to fundamentally alter the Internet in America unless Congress acts to stop them. They have the market power, technical means, and regulatory permission to control American consumers' access to broadband Internet content and they have announced their plans to do so.

Mr. Chairman, as much as we wish it were otherwise, consumers have little or no real choice of broadband Internet access. For the foreseeable future, nearly all Americans will have two or fewer providers available, the phone company, the cable company or both. Unless Congress acts soon, American consumers will receive artificially limited choice of broadband Internet content. Phone and cable companies plan to restrict American consumers' access to such content based in large part on the lucrative deals they intend to cut with third parties.

As best as we can tell, the network operators plan to artificially limit consumer choice of broadband Internet content in three essential ways. First, each network operator has or is constructing a fast lane for their affiliated broadband content provided by itself for its sister company, and a slow lane for broadband Internet company provided by others. Second, the network operators intend to offer paid prioritization, essentially a paid police escort for broadband Internet content providers. Their plan that as content enters their slow lanes from an Internet or other network access point, the speed with which this content transits their network will be determined in part based on whether the content owner paid for prioritization. No one is suggesting that certain types of services be denied prioritization, just like certain kinds of road traffic like emergency services deserve police escort, but such police escort should not be made available for a fee, otherwise those unable to pay the fee will always be stuck in traffic. And third, network operators intend to offer downstream content injection, essentially local on ramps to content providers who are willing to pay. This would enable content to be delivered from geographic locations closer to consumers and provide better user experiences. Although content providers have no expectation that such local on ramps must be provided for free, network operators must not offer local on ramps on discriminatory terms for affiliated traffic.

Mr. Chairman, the bill appropriately addresses the preservation of American consumers' longstanding freedom of choice of Internet content in the context of national video franchising relief. Unfortunately, with all due respect, the bill's provisions are wholly inadequate to preserve American consumers' freedom of choice of Internet content. These provisions would not keep the network operators from cutting paid police escort deals that would adversely affect the traffic of other content providers who can't or won't pay and these provisions would not keep the operators from insisting upon unreasonable or discriminatory terms for leasing local on ramps.

Mr. Chairman, we respectfully ask that Congress insert and enact modest, but effective safeguards to reinstate limited protections that the FCC recently abandoned and thereby preserve American consumers' longstanding freedom of choice of Internet content. First, for traffic

within the broadband networks, Internet access lane police escort, a kind of prioritization, may be provided only based on the kind of traffic and whether the consumer has paid more for a somewhat higher speed limit, and second, local on ramps into the Internet access lane need not be free, but the road owner must not charge unreasonable or discriminatory rates to favor their own or some other's traffic.

In conclusion, Mr. Chairman, the phone and cable companies are going to fundamentally alter the Internet in America unless Congress acts to stop them. They have the market power, technical means and regulatory permission to control American consumers' access to broadband Internet content and they have announced plans to do so. I urge that you reject as inadequate the provisions of the bill and instead insert and enact modest but effective safeguards to preserve American consumers' longstanding freedom of Internet content and choice. Thank you very much, and I look forward to your questions.

[The prepared statement of Paul Misener follows:]

PREPARED STATEMENT OF PAUL MISENER, VICE PRESIDENT FOR GLOBAL PUBLIC POLICY, AMAZON.COM

Good morning, Chairman Upton, Mr. Markey, and members of the Subcommittee. My name is Paul Misener. I am Amazon.com's Vice President for Global Public Policy. Thank you very much for inviting me to testify on this important matter. I respectfully request that my entire written statement be included in the record.

I. INTRODUCTION

Mr. Chairman, the phone and cable companies are going to fundamentally alter the Internet in America unless Congress acts to stop them. They have the market power, technical means, and regulatory permission to control American consumers' access to broadband Internet content, and they've announced their plans to do so.

American consumers have little or no real choice of broadband Internet *access* and – unless Congress acts soon to reinstate modest safeguards recently removed by the FCC – consumer choice of broadband Internet *content* will be artificially limited. In my time this morning, I will describe the market power of network operators and the details of how they intend to extend that market power to limit consumer choice of content, such as movies, television, and music. I then will describe how the Committee Print (the "bill") fails to confront this clear and present danger. Lastly, I will propose modest but effective safeguards to preserve American consumers' longstanding freedom of Internet content choice.

We simply ask that Congress keep the telco and cable operators from taking their market power over broadband Internet access and extending it to market power over broadband Internet content.

Amazon.com, an Internet-based retailer with tens of millions of American customers, is involved in these discussions because we want to ensure that our customers retain the unimpaired ability to access the broadband Internet content of their choice, including that content available from Amazon.com. Currently, consumers pay for Internet access, and have the freedom to select lawful content from providers like Amazon, who themselves have invested billions of dollars in content and pay network operators millions of dollars a year for Internet access. We fear a circumstance in which

broadband network operators, among whom consumers have no real choice, are permitted to prefer certain content and thereby limit consumer access to other content. Other large companies, including eBay, Google, IAC/Interactive, Microsoft, and Yahoo, join Amazon in expressing this concern.

This is not just a big company concern, however. Earlier this month, six dozen entities, ranging from the AARP and the Consumer Federation of America, to Educause and Internet2, wrote to the full Energy and Commerce Committee to say that, "[w]hile it is appropriate for Congress to develop new legislation to promote competition among broadband networks, it must also ensure that consumers and providers continue to have the right to use those networks to send and receive content, and to use applications and services, without interference by network operators." Amazon hopes that these views and, most importantly to us, the interests of our customers, will be thoroughly considered.

II. CONSUMERS HAVE LITTLE OR NO REAL CHOICE OF BROADBAND INTERNET ACCESS

Mr. Chairman, as much as we wish it were otherwise, consumers have little or no real choice of broadband Internet access. For the foreseeable future, nearly all Americans will have two or fewer providers available: the phone company, the cable company, or both. And, unfortunately, even the lucky consumers for whom multiple service providers are available will continue to face discouragingly high costs of switching among them. Equipment swaps, inside wiring changes, technician visits, long term contracts, and the bundling of multiple services all contribute to these costs.

Despite the common misconception that the Internet grew up in an unregulated environment, its growth and success were due in large measure to the extensive rules that governed its infrastructure until last year when the FCC issued its final wireline broadband order. Although many of these rules were outdated and worthy of deregulation, it makes sense to completely abandon longstanding non-discrimination requirements only if and when the market is truly competitive. The FCC believes that the market is competitive, but it is not.

Indeed, the FCC's data on the competitive availability of broadband access are fundamentally misleading. These data, which purport to show multiple broadband service providers in many areas of the country, completely obscure the realities faced by individual consumers. Unfortunately, however, these data also were the basis for the Commission's recent actions.

In the first place, the data count as high-speed broadband any services that deliver as little as 200 kbps in one direction. Although this may have been a reasonable definition of broadband a decade ago, it is preposterously slow today, incapable of delivering even standard definition live video, and *one five-hundredth* the speed being deployed to millions of consumers in Korea and elsewhere. Second, the geographic areas analyzed are zip codes, not individual neighborhoods or households. So while there may be three or four true broadband network operators (for example, two telcos and two cable companies) serving small separate areas in a zip code, no one consumer may have access to more than two of them (one telco and one cable company). And, third, the data include lines of network operators that serve small businesses (for example, in office parks) but not residential neighborhoods.

The result of these misleading FCC data is that the amount of broadband consumer choice is portrayed as wildly optimistic, particularly when the aforementioned high switching costs are considered. If it really were easy for Americans to switch among five, six, or more true broadband Internet access providers, the market would be competitive and legislated consumer safeguards would be unnecessary.

What exists, unfortunately, is at best an oligopoly and, for the vast majority of Americans, a duopoly of the local phone and cable companies. Widespread deployment of alternative broadband technologies capable of high quality video remains a distant

hope, and the promise of inter-regional local phone company competition is all but dead. In such oligopolistic conditions, firms easily can and do leave consumers with fewer services, higher prices, or both.

To be clear, we don't oppose network operators' entry into competing businesses so long as they are not allowed to leverage their market power over broadband Internet access to favor these ancillary endeavors. Also, we welcome broadband network operators' innovations within the network. With Moore's Law at work, network operators ought to be able to deploy innovative new technologies and services that, with increasing efficiency, provide benefits to operators and users alike. Moreover, we don't begrudge the phone and cable companies their current market power over the network. Despite the longstanding desires and noble aspirations of policy makers, we're stuck with this super-concentrated broadband Internet access market for the foreseeable future.

Lastly, although we oppose the collection of monopoly rents, we certainly don't seek to deny network operators a healthy return on their investments. Content providers currently pay network operators for the amount of connection capacity they use, and network operators can charge consumers different prices depending upon how much bandwidth they use. This sort of connectivity "tiering" makes perfect sense. And, of course, network operators will charge consumers for the provision of any ancillary services, such as affiliated video content.

What we seek is more modest, yet far more important: We ask that Congress keep the telco and cable operators from taking their market power over broadband Internet access and extending it to market power over broadband Internet content.

III. CONSUMER CHOICE OF BROADBAND INTERNET CONTENT WILL BE LIMITED UNLESS CONGRESS ACTS

Mr. Chairman, unless Congress acts soon, American consumers will receive artificially limited choice of broadband Internet content. Phone and cable companies plan to restrict American consumers' access to such content based in large part on lucrative deals they intend to cut with third parties. Such business plans might be acceptable if consumers had meaningful choice among network operators. But, as described before, consumers have no meaningful choice.

In recent years, the FCC has reclassified broadband Internet access by wireline service providers, both telco and cable. Although the Commission adopted a policy statement that confirms the agency's statutory authority and possible intentions to act, the statement fails to address some likely discriminatory behaviors and, in any case, the FCC decided to make it unenforceable. So, with the exception of weak merger conditions that apply the FCC's policy statement to a few network operators, and expires for no apparent reason in 18 months (the market certainly won't be competitive by then), telcos and cable companies may artificially limit consumer access to content at will. Because consumer access to content is in jeopardy, Congress needs to act.

Just as it is clear that the network operators have the market power to limit consumer choice of broadband Internet content, it has become equally clear that they fully intend to do so. Not only have the telcos and cable companies stridently and steadfastly opposed any meaningful network neutrality rules, their most senior executives have, over the past six months (noticeably after the FCC's final reclassification actions), issued refreshingly honest statements that reveal their plans for limiting consumer access to content. Simply put, the network operators are planning to limit consumer choice of broadband Internet content based in part on deals they intend to strike with content providers. Although the network operators have been somewhat less clear on exactly *how* they intend to limit consumer access, their FCC filings and public statements reveal that they plan to do so in three key ways.

Before I describe the three key ways operators plan to limit consumer access to content, please allow me to summarize their technology plans. Although there are many

differences among the technologies the duopoly network operators intend to use (hybrid fiber-coax by the cable operators and either fiber-to-the-home or fiber-to-the-node plus DSL twisted pair by the telco operators), all three technologies have been designed to operate the same way in practice, with two downstream components: a very high capacity ("fast lane") cable-like private network component, and a much lower capacity ("slow lane") downstream broadband Internet access component. The fast lane will be operated as a closed network, while the slow lane will be more (but, as it turns out, perhaps not entirely) open.

A. Specific Network Operator Plans

As best as we can tell, the network operators plan to artificially limit consumer choice of broadband Internet content in three essential ways: (1) a closed fast lane and an open slow lane; (2) paid 'police escort' *within* the slow lane; and (3) preferential "local on-ramps" *into* the slow lane.

1. Closed Fast Lane and Open Slow Lane. First, as noted before, each network operator has or is constructing a fast lane for their affiliated broadband content provided by a sister company and a slow lane for broadband Internet content provided by others. The fast lane they reserve for themselves is a closed, private network. This has always been the case for cable operators and, even for the telco operators deploying broadband, make no mistake: the overall broadband pipes they're deploying are mostly just another version of cable TV, not broadband Internet. Consumers should recognize that despite the nearly ubiquitous and puffy advertising, it's not about "your world, delivered," it's mostly about *their* world.

2. Paid Police Escort within the Slow Lane. Second, the network operators intend to offer paid prioritization (essentially a paid "police escort" in the slow lane) for broadband Internet content providers. Their plan is that, as content enters their slow lanes from an Internet or other network access point, the speed with which this content transits their network will be determined, in part, based on whether the content owner paid for prioritization. The terms of art the network operators use to describe this prioritization include "quality of service" and "tiering." Each term is intentionally confusing. No one is suggesting that certain types of services be denied prioritization, just like certain kinds of road traffic, like emergency services, deserve police escort. But such police escort should not be made available for a fee; otherwise those unable to pay the fee will always be stuck in traffic. Put another way, to prioritize some traffic is to degrade other traffic. It's a zero-sum game at any bottleneck. This fact is intentionally obscured by network operators, who incorrectly claim that they will not degrade anyone's content. Neutral prioritization (for example, network management whereby all live video receives priority above all text files) would be perfectly acceptable. But for an operator to offer priority to the highest bidder, the degradation of service to content providers who can't or don't pay is unfair, at best.

As should be obvious, small businesses will have a very hard time innovating if they need to pay for 'police escort' prioritization to compete. When some companies like mine have noted this previously, some of the network operators respond with something to the effect of "beware when big companies are looking out for the interests of little ones." That response seeks to change the subject and obscure three key points. First, it doesn't change the underlying fact that small entrepreneurs – facing a possible bidding war among big companies – are going to be hurt unless Congress does something now. Second, many of the big companies noting this imminent throttle on small company innovation were, indeed, innovative small companies only just a few years ago. And, third, on behalf of our customers, we want to ensure that our innovations – essentially new businesses operating in start-up mode by our employees – are not hindered in the same way. We merely want, as Vint Cerf so clearly puts it, "to innovate without

permission" of the network operators. Surely the small start-up entrepreneurs of today want the same freedom to invent.

3. Preferential Local On-Ramps into the Slow Lane. Lastly, the network operators intend to offer downstream content injection (essentially "local on-ramps" for the broadband slow lane) to content providers who are willing to pay. This would enable content to be delivered from geographic locations closer to consumers and provide better user experiences. Such local on-ramps already are provided in a competitive access market by companies such as Akamai, which has servers distributed throughout the United States so that content can be delivered quickly to consumers, rather than having to traverse great distances on the Internet. Although content providers have no expectation that such local on-ramps must be provided for free, network operators must not offer local on-ramps on discriminatory terms for affiliated traffic.

B. Network Operator Claims

So how do the network operators discuss these plans? They obfuscate. For example, most network operators say they won't, quote, "block" websites. This relatively new concession is neither noble nor comforting and, in fact, it is quite misleading. While they may not actually block access to a particular website, they easily could make that site's content unusable, either by overly constraining capacity (making the slow lane too slow); by providing prioritization only to those willing and able to pay (the paid "police escorts"); or by providing downstream injection (the local on-ramps) only on unreasonable or discriminatory terms. So it's a matter of semantics: they may never block content but still could make it unusable.

Other network operators say, dismissively, that this is a "solution in search of a problem," or that policymakers should wait for a problem to arise before acting. But what further proof is needed? The time to act is now. To ignore the network operators' economic and technical power, their strident and steadfast opposition to meaningful safeguards, their bold announced intentions, and their increasingly clear specific plans, is truly to turn a blind eye to an obvious and serious threat to consumers.

IV. THE BILL WOULD FAIL TO PRESERVE CONSUMER FREEDOM OF CHOICE OF INTERNET CONTENT

Mr. Chairman, the bill appropriately addresses the preservation of American consumers' longstanding freedom of choice of Internet content in the context of national video franchising relief. The principal reason for granting national video franchising relief is, of course, the introduction of additional video competition for consumers. It would be counterproductive, however, to facilitate the delivery of content of one additional competitor (the phone company), while limiting the availability of thousands of other competitors via the Internet. In the interests of competition and consumer choice, therefore, video franchising relief must not be granted without meaningful broadband Internet content safeguards; otherwise, consumers will receive *less*, not more, choice of content.

Unfortunately, Mr. Chairman, and with all due respect, the bill's provisions entitled "Enforcement of Broadband Policy Statement" are wholly inadequate to preserve American consumers' freedom of choice of Internet content. The underlying vague FCC statements of how consumers have various entitlements need strengthening and elaboration, or otherwise could result in invitations to litigation in which the courts, not Congress, make critical policy.

Most fundamentally, these provisions would *not* keep the network operators from cutting "paid police escort" deals that would adversely affect the traffic of other content providers who can't or don't pay. Entitling consumers to "access" content and services does not clearly ensure that such content or services will be usable if it gets discriminatorily slowed in traffic. And these provisions would *not* keep the operators

from insisting upon unreasonable or discriminatory terms for leasing "local on-ramps." Entitling consumers to competition among content and service providers doesn't clearly prohibit network operators from biasing the competition.

In short, the most likely and dangerous anti-consumer discriminatory behaviors of broadband network operators would not be thwarted by the provisions of the bill.

Moreover, as I noted in my testimony before this Subcommittee almost three years ago, and as the FCC recognized in its final wireline broadband reclassification order last August, the Commission does not need new authority to act in this area. What the FCC needs is to be *directed* by Congress to use its authority to prevent the network operators from artificially constraining American consumers' choice of broadband Internet content. To deny the agency its general rulemaking and enforcement authority with respect to even the modest protections of the Commission's earlier policy statement apparently disregards the operators' power and intentions.

V. MODEST SAFEGUARDS WOULD PRESERVE CONSUMER FREEDOM OF CHOICE OF INTERNET CONTENT

Mr. Chairman, we respectfully ask that, in lieu of the current "Enforcement of Broadband Policy Statement" provisions of the bill, Congress insert and enact modest but effective safeguards to reinstate limited protections that the FCC recently abandoned, and thereby preserve American consumers' longstanding freedom of choice of Internet content. Without much effort, these safeguards can be narrowly drawn so that operators' private networks are not invaded and so that operators are appropriately compensated for the services they provide.

Two essential consumer safeguards we seek can be summarized as follows:

(1) Content transiting an operator's broadband Internet access network may be prioritized only on the basis of the type of content and the level of bandwidth purchased by the consumer, not ownership, source, or affiliation of the content. (That is, for traffic within the broadband network's Internet access lane, "police escort" may be provided only based on the kind of traffic and whether the consumer has a paid more for a somewhat higher speed limit.)

(2) The terms for local content injection must be reasonable and non-discriminatory; network operators must not be allowed to give preferential deals to affiliated or certain other content providers. (That is, "local on-ramps" into the Internet access lane need not be free, but the road owner must not charge unreasonable or discriminatory rates to favor their own or only some others' traffic.)

With these two modest safeguards, appropriately drafted and clarified, American consumers could be confident that their longstanding choice of lawful Internet content will not be limited by network operators.

VI. CONCLUSION

In conclusion, Mr. Chairman, the phone and cable companies are going to fundamentally alter the Internet in America unless Congress acts to stop them. They have the market power, technical means, and regulatory permission to control American consumers' access to broadband Internet content, and they've announced plans to do so.

For the foreseeable future, American consumers will have little or no real choice of broadband Internet access. And – unless Congress acts soon to reinstate modest and longstanding consumer safeguards – consumer choice of broadband Internet content will be artificially limited. I urge you and your colleagues to recognize that, despite how we wish it were otherwise, the market for broadband Internet access is not competitive and that the network operators fully intend to extend their market power to limit consumer choice of content. I also urge that you reject as inadequate the provisions of the bill and,

instead, insert and enact modest but effective safeguards to preserve American consumers' longstanding freedom of Internet content choice.

Thank you. I look forward to your questions.

MR. WALDEN. Thank you, Mr. Misener. Thank you for your testimony. Mr. Keefe, welcome. We look forward to your comments, sir.

MR. KEEFE. Thank you. Good afternoon, Mr. Chairman. My name is Dave Keefe. I am the CEO and co-founder of Atlantic Broadband, which operates in six States. I am also a board member of the American Cable Association which has members in every State.

Mr. Chairman, I would like to separate my remarks into two distinct elements. To start, and in regards to the committee print, there are three issues I would like to address.

First, while we didn't ask Congress to alter the franchising rules, we appreciate that the committee print takes on reform in a technological and competitively neutral manner. Second, regarding net neutral, ACA member companies are examining the effects of this language and will provide more specific comment to the committee. Finally, while competition is something our members welcome and experience, we have concerns with municipal overbills in communities where we have already invested.

In short, ACA members view favorably the evolution of the committee print. We appreciate this draft does not include the market test and uniform rate requirements that have been rumored for inclusion. Having said that, the American Cable Association cannot support legislation that is silent on what we consider to be one of the core issues still unaddressed, the lack of competition in the video marketplace. If Congress wants to improve video services as stated here, we must address the problems retransmission consent is causing.

Mr. Chairman, the ACA is not alone in recognizing the need for retransmission consent reform. In fact, Echostar, the National Telecommunications Cooperative Association, OPASTCO, the Broadband Service Providers Association and many other interest groups have joined forces for reform. Retransmission consent rules were put into place to allow local broadcasters to seek compensation from local cable operators for carriage of the local broadcast signals. This governmental grant was provided to free, over-the-air broadcasters, in addition to the grant of must carry. The Government supplemented these benefits by also granting broadcasters exclusivity rights in any given broadcast market to ensure that a competing channel in a neighboring market cannot be substituted. These anti-competitive rules guarantee the broadcaster is the sole supplier of broadcast network in a given market with absolute pricing power and the leverage to pull that broadcast signal

from the provider. Is it any wonder that such entities like ACA and Echostar, who see the problems retransmission consent is creating for consumers, are calling for action while the monopolists that benefit from the skewed regulatory scheme are telling Congress that there isn't a problem. Doesn't that tell you something?

So why must retransmission consent be eliminated? Well, first, it raises prices for programming without regard for the value that the consumer may or may not put on it. Second, it reduces diversity in programming by limiting most new channels to those offered by conglomerates that can compel carriage using their governmental-granted spectrum signal leverage. And third, it does not encourage localism but it has become a means for extracting unjustified non-market-based fees for the consumer. Therefore, we urge you to allow a competitive marketplace to replace the regulatory scheme that today simply guarantees profits for the lucky few companies that won the spectrum lottery from the Government back in the '40s and the '50s. Broadcasters have attempted to discredit our concerns as misguided in order to deflect any review of the real story which would reveal the costs of this scheme to consumers. We have put some sunshine on this. But I urge you not to be distracted by their tactics. Listen to what the broadcasters not only are saying to Congress, but what they are telling Wall Street. CBS President and CEO Les Moonves was quoted earlier in the month as bragging to Wall Street that retransmission consent could, "amount to hundreds of millions of dollars to the CBS network." Sinclair CEO David Smith joyfully told an investors' conference earlier this month that he plans to quadruple retrans revenue to $100 million within three years, saying that "it is very clear to us, everybody is going to pay; the only issue is what day and how much." It appears the networks view retransmission consent as a means to extract hundreds of millions of dollars from your constituents, our customers' pockets in order to receive their free over-the-air signals. Is that really what you want to tell your constituents you let happen during this debate?

Mr. Chairman, many argue this topic is not appropriate for this bill and it should just be swept under the rug, but it is vitally important for you to consider fixing the problems for all providers before it is too late, even of the new entrants you aim to help with this bill. Creating a competitive pipe that dead ends at the doorstop of monopoly providers will not provide your constituents a better experience and will not allow me to innovate and create products your constituents and our customers would want us to offer. I urge you now to act to stand with cable operators, with family, faith-based organizations, satellite companies, rural telephone companies, rural co-ops, and consumer groups, a pretty

unusual and broad alliance, I might add, by unleashing the power of the marketplace for your constituents and my customers. Thanks.

[The prepared statement of David J. Keefe follows:]

PREPARED STATEMENT OF DAVID J. KEEFE, CHIEF EXECUTIVE OFFICER, ATLANTIC BROADBAND, ON BEHALF OF AMERICAN CABLE ASSOCIATION

Thank you, Mr. Chairman. My name is Dave Keefe, and I am the CEO of Atlantic Broadband and a board member of the American Cable Association. My independent cable company, Atlantic Broadband, serves customers in six states. ACA represents 1,100 smaller and medium-sized cable companies that primarily serve smaller markets and rural areas located in every state.

Our members proudly invest their own capital into their systems to provide many of the services today that your legislation intends to promote. The advanced video and high-speed Internet access we offer in many of our more rural markets often represents the only option our customers have to avoid being on the losing end of the "digital divide."

I would like to separate my remarks today into two distinct elements.

First, I would like to briefly give ACA's commentary on the language currently in the Committee Print.

Second, and more importantly, I would like to mention the one issue that ACA strongly urges the Committee to include in the legislation if it wants to ensure that the stated goal of promoting and enhancing broadband development and the many exciting services it can bring with it is to be realized by the consumers in the smaller and rural markets we serve.

To start and in regards to the Committee Print, there are three issues I would like to address.

First, while we did not ask Congress to alter the franchising rules and have largely enjoyed a productive relationship with our local franchising authorities, we do not oppose the language in the Committee Print and appreciate the Committee Print taking on these reforms in a technology and competitively neutral manner.

Second, the language pertaining to "net neutrality" is another issue the ACA has not pursued with Congress. ACA member companies are still examining the effects of this language and I would ask if the Association be able to follow up with more specific comments soon. In the interim and on behalf of virtually all of our ACA member companies that currently offer high-speed Internet service in smaller and rural markets, I do not today see this language as posing monumental concerns at this time to ACA.

Lastly, while competition is something our members welcome and currently experience on multiple fronts, we do have concerns with municipal overbuild efforts in the communities we have already invested in and would urge the Committee to encourage municipalities to invest in areas that are currently unserved by existing providers.

In short, on behalf of the members of the American Cable Association, we do not oppose the Committee Print and appreciate the Chairman taking out of the Committee Print the market test based language we had seen in previous drafts.

Having said this, the American Cable Association cannot support legislation that is silent on what we consider to be the fundamental issue facing our members in rural and smaller markets across this country, specifically the market abuses we witness on a daily basis by the programmers as a result of retransmission consent rules and regulations that are just as ripe for reform as the franchising rules you have addressed in the Committee Print. We are not alone in recognizing this need for retransmission consent reform. In fact, EchoStar, the National Telecommunications Cooperative Association, OPASTCO,

and the Broadband Service Providers Association have joined forces to push for reform. The common link among these diverse voices is the fact that we are not vertically integrated and do not own programming.

Retransmission Consent rules were put in place 14 years ago to allow the local broadcaster to seek compensation from the local cable operator for carriage of that local broadcast signal. These rules were put into place as an alternative to broadcasters' must-carry rights which if exercised, obligate the pay-television provider to carry a broadcast station. In addition to this guarantee of carriage – whether it be for free via must-carry or for a price via retransmission consent – the government also granted the broadcaster exclusivity rights in any given local broadcast market to ensure that a competing channel in a neighboring market cannot be substituted.

These anti-competitive rules allow the broadcaster to be the sole supplier of a broadcast network in a given market with absolute pricing power and the leverage to pull their broadcast signal from the provider. No wonder the NAB and the big networks are fighting to make no changes to the current retransmission consent regime!

Over the past 14 years, the growing media consolidation we have seen in the broadcasting community has allowed for this regulatory regime to be manipulated to guarantee profit for the four network conglomerates and major broadcast groups.

Retransmission consent and exclusivity, coupled with vastly increasing media consolidation, provide the means today for broadcasters and networks to extract increased costs from consumers and to force carriage of unwanted bundles of programming that appeal only to the bottom line of advertisers.

The broadcasters argue that they do not "require" cable and satellite operators to carry channels they do not want. Our members experience something quite different. While they may not "require" us to take undesirable programming, they instead provide us with a Hobson's choice: Either take the vast menu of other channels – no matter if they are objectionable, indecent, undesirable or invaluable to consumers in our markets – at increased prices and you can have our local affiliate at a reasonable price, OR don't take the whole menu and get gouged for the price of the stand-alone affiliate.

Clearly, these retransmission consent negotiations have evolved into simple exercises to increase the bottom line of the Big Four television networks and the major broadcast groups: if we choose to carry additional programming whether our subscribers find it offensive or not, the broadcaster will make their profit on additional ad revenue and additional programming fees for the unwanted programming. If we choose to answer our market's demands and carry only the broadcast channel, the broadcaster will extract their profit more directly from my customers and your constituents through direct cash payments.

The members of the American Cable Association are not asking for you to give us the broadcast signal for free. Rather, we ask that Congress address our inability to "negotiate" as a direct result of the market Congress dictated and designed.

Pay-television providers, particularly those in smaller and rural markets, have no leverage against these programming conglomerates. We are offered a price and left with the option to take or leave it.

We are simply asking for your help to level the playing field so that a real economic market can dictate the true cost and value of programming.

Broadcasters have attempted to discredit our concerns as misguided. Naturally, as the beneficiaries of the current regime, they plead for you to make no changes to the current retransmission consent regime. However, I would urge you to not only listen to what the broadcasters say to Congress, but also look at what they tell Wall Street.

CBS President and CEO Les Moonves was quoted earlier this month as saying that retransmission consent negotiations could "amount to hundreds of millions of dollars in revenue to the CBS network." Sinclair CEO David Smith told an investor conference earlier this month that he plans to quadruple retrans revenue to $100 million within 3

years, saying that, "It's very clear to us everybody is going to pay; the only issue is what day and how much."

Again, we are not asking for the broadcast signal for free, but I do ask, how does a process that gives this much leverage to a few conglomerates to increase revenue at an alarming rate by pushing down costs and carriage to my members and your constituents promote localism? How does this help control cable and satellite rates? How does this give more flexibility and options to operators to deliver programming people want to see? You may ask "why is this relevant to the Committee Print we examine today?" I am here today to tell you that if the goal of this legislation is to inject competition in the marketplace in order to lower rates, you cannot inject competition only on the provider side of the equation. You must also assess the competition in the video programming market.

If the government wants to uphold market exclusivity for the local broadcaster and allow him to seek compensation for his signal, fine. But Congress must also have a mechanism – whether it be accountability, transparency or competition for reigning in the egregious compensation sought by the broadcaster and paid for by the consumer.

The current archaic regulatory-governed marketplace for programming gives the video provider two options: take it, or leave it. If an operator decides to 'leave it', he is abandoning localism. If he agrees to 'take it', he is raising cable rates for his subscribers. Video over IP, which is what your bill intends to promote, will be an exciting way that consumers will have choices and options they have never seen or experienced before. Do you really want to promote the build out of these pipes and leave analog-world rules in place that limit the operators' flexibility in offering various packages of programming and impede the innovation we all envision from flowing through them?

I urge you to see the same problems that ACA, Echostar, the National Telecommunications Cooperative Association, OPASTCO and the Broadband Service Providers Association see. Retransmission Consent, as currently constructed, is broken and must be fixed for this bill to achieve its stated goal. All the competition and infrastructure in the world is useless if the content is controlled by a select few who can use an outdated regulatory scheme to extract profits at any rate they see fit.

MR. WALDEN. Thank you, Mr. Keefe, and Mr. Fritz, it is good to have you here and representing the broadcasters, somebody named Fritz, it is unusual, even if it is a different spelling.

MR. FRITZ. If I could get his checks. Thank you, Mr. Chairman, members of the subcommittee. My name is Jerry Fritz. I am the Senior Vice President for Legal and Strategic Affairs for Allbritton Communications Company. Allbritton operates broadcast television stations in several markets including here in Washington, Lynchburg, Virginia, Harrisburg, Little Rock, Tulsa, Birmingham, and Charleston, South Carolina. We also operate the 24-hour cable news channel here in the Washington market.

I am testifying today on behalf of the National Association of Broadcasters, of which I am a former board member. The television industry is pleased to be testifying about the proposed legislation. We applaud your effort to promote competition in the video marketplace. Greater competition will benefit consumers and broadcasters. We support the legislation for this reason and because we understand that it will preserve longstanding policies, including carriage and

retransmission consent for local broadcast signals and local program exclusivity.

Our comments on this bill are quite limited. As you know, broadcast TV comes to your constituents in several different ways. Some get it over the air. Some get it via satellite. Some get it from telephone companies and now even via cell phones. Most get it via cable. Broadcast television channels are the raw materials that cable and satellite operators package with other channels to sell to your constituents. This programming costs broadcasters quite a bit of money to produce or acquire and it has real value. The question is, should cable and satellite operators pay for that value? This question was answered 14 years ago and the answer was yes.

Congress created the retransmission consent process in 1992 to reorient a skewed marketplace that prevented broadcasters from realizing that value. Congress undertook the complex task of leveling to permit a free market to flourish where broadcasters and cable operators could bargain as equals over the value of this raw material. Then came John Malone, who operated the largest group of cable systems in America. Malone drew a line in the sand proclaiming that he would not pay cash for broadcast channels. The rest of the cable industry fell in line and lockstep. Broadcasters could play chicken and risk losing access to 70 percent of their customers or forego compensation, but Mr. Malone signaled that he would pay for new value to systems, meaning new program channels. Up sprang local weather, sports, and regional news channels. Your television sets in Cannon, Rayburn, Longworth, and Ford, and those on the Senate side as well, all carry news channel 8. That is the Allbritton 24-hour cable news channel co-owned with WJLA that together produce over 16 and half hours of live news per day. That is over four times the average news programming from a typical broadcast station. That is localism. It is similar to broadcaster-owned news channels in New England, Chicago, Columbus, Seattle, Orlando, Raleigh, Austin, Albany, Memphis, even Boise, Idaho. These remarkable channels are fostered by our ability to negotiate with cable operators. Cable doesn't pay us for WJLA, but they do for news channel 8. We win, cable operators win, advertisers win. Our local and regional government representatives win with daily access to their constituents and most of all, viewers win. Why? Because the retransmission consent regimen works. The negotiations are hard and extremely complex. Both sides come to the table with value. Cable and satellite together have virtual monopoly gatekeeper control over 80 percent of our viewers. On the other hand, broadcasters have the most desirable programming on cable. We each need one another.

The system is working just as Congress had envisioned it. That was underscored just six months ago when Congress's experts, the FCC, reported that broadcasters and cable/satellite operators negotiate on a level playing field. The Commission emphasized that the carefully balanced combination of copyright, exclusivity rules, and retransmission consent provides the benefits that Congress had foreseen. It strongly opposed altering just the retransmission consent regimen without also addressing other intricate components of the balance.

In this day of dramatic cable consolidation, it is important that Congress not put its thumb on the scales of free and balanced negotiations. We do not need a new Federal mandate interfering with private negotiations.

Mr. Chairman, broadcasters are happy to provide valuable channels to cable and satellite packagers, but like the baker or car manufacturer or homebuilder, our raw materials are not free. Tinkering with this free-market model that demonstrably works will have severe unintended consequences including the loss of programming like news channel 8. This will dramatically alter the fair allocation of value freely negotiated. Thank you.

[The prepared statement of Jerry Fritz follows:]

PREPARED STATEMENT OF JERRY FRITZ, SENIOR VICE PRESIDENT FOR LEGAL AND STRATEGIC AFFAIRS AND GENERAL COUNSEL, ALLBRITTON COMMUNICATIONS COMPANY, ON BEHALF OF NATIONAL ASSOCIATION OF BROADCASTERS

Good morning Chairman Upton, Ranking Member Markey, and Members of the Subcommittee, my name is Jerry Fritz. I am the Senior Vice President for Legal and Strategic Affairs for Allbritton Communications Company, the parent company of eight broadcast television stations including WJLA, Channel 7 here in Washington, DC, along with NewsChannel 8, the 24-hour cable news channel in Washington, Maryland and Virginia. Today I am testifying on behalf of the National Association of Broadcasters (NAB), a trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and the Courts.

The television industry is pleased to be testifying about the proposed legislation, which is intended to promote competition in the multichannel video programming distribution (MVPD) market by encouraging new entrants. Greater competition in local video programming markets across the country would benefit consumers and broadcasters by providing new delivery platforms and more choices. Broadcasters generally support streamlining the franchising process as a way to promote entry by new competitors, such as telephone companies, into the consolidated MVPD marketplace. We support the proposed legislation on this basis, and on our understanding that it extends long-standing policies designed to promote localism, competition and diversity – including carriage and retransmission consent for local broadcast signals and local program exclusivity – equally to cable operators obtaining the new national franchise.

Broadcasters understand that Congress' basic public policy goal in proposing this legislation is to permit a competitive video marketplace to function. That same public policy goal was the basis for Congress' 1992 action creating a marketplace in which

broadcasters have the opportunity to negotiate for compensation for MVPDs' use of their signals to attract paying subscribers. As the Federal Communications Commission (FCC) recently found, this retransmission consent marketplace functions as Congress intended and benefits broadcasters, MVPDs and, most importantly, consumers. Certain cable and satellite companies have recently asked Congress to interfere with these market-based negotiations for retransmission consent. These demands for a federal mandate purely to benefit MVPD self-interests while usurping the free functioning of the market are fundamentally unfair, and pose a very real threat to the ability of broadcasters to provide locally oriented programming to communities throughout the country.

The Deployment of Competitive MVPD Services Will Benefit Consumers and Programming Providers, Including Broadcasters

Television broadcasters support efforts to speed the deployment of new and innovative MVPD services. Particularly in light of massive consolidation in the cable industry, a new video distribution platform offers great promise. According to the FCC, the four largest MVPDs served 63 percent of all MVPD subscribers in 2005, up from 58 percent in 2004. FCC, *Twelfth Annual Report* in MB Docket No. 05-255, FCC 06-11 at ¶ 9 (rel. March 3, 2006). MVPD services offered over the platforms of new competitors have the clear potential to introduce much needed competition into this regionally and nationally consolidated marketplace. NAB sees this as a positive development for cable programming providers unaffiliated with cable operators, broadcasters and, most importantly, consumers.

Simply put, competition leads to better service at lower prices. For example, the Government Accountability Office (GAO) has found that competition to an incumbent cable operator from a wireline provider resulted in cable rates that were 15 percent lower than in markets without this competition. GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 at 9-11 (Oct. 2003). In another study comparing markets with competition from an overbuilder with those lacking such competition, GAO found that communities with overbuild competition experienced an average of 23 percent lower rates for basic cable and higher quality service. GAO, *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241 (Feb. 2004). Without question, consumers will benefit from the lower prices, improved quality of service, and increased choices that competition should bring.

Video programming providers will also benefit from the timely deployment of a new video distribution platform. The emergence of another platform for the distribution of video programming will provide programmers unaffiliated with cable operators with potential new outlets for reaching viewers and therefore with greater opportunities for success in the marketplace. A number of cable programming networks and regional sports networks have previously expressed concern that large, consolidated cable operators are increasingly able to exclude independent programming networks from their systems and, thus, from the marketplace. *See, e.g., Twelfth Annual Report* at ¶¶ 173, 184. The rapid deployment of a competitive video distribution platform will ameliorate such problems, thereby also benefiting consumers through additional, diverse programming options.

Local television broadcasters will similarly benefit from the emergence of another competitive MVPD service. A new video distribution platform will represent another outlet for broadcast programming, including local news and information. Given broadcasters' dependence on advertising revenue (and thus on reaching as many viewers as possible), the expansion of our opportunities for reaching consumers must be regarded as positive. The development of another video distribution platform for carrying broadcast programming may also encourage the development of innovative digital television programming, including multicast and high definition (HD) programming. If

new MVPDs emerge as viable platforms for carrying local stations' HD and multicast programs, broadcasters will be encouraged to make the substantial investments needed to bring their multicast service plans to fruition. In the end, it is consumers that will benefit by receiving a greater diversity of programming, including local programming, from multicasting broadcast stations and unaffiliated cable programmers via a competitive MVPD.

Consumers will also benefit from extending long-standing policies designed to promote localism, competition and diversity – including carriage and retransmission consent for local broadcast signals and local program exclusivity – equally to the new multichannel platforms. Over the past decades, Congress and the FCC have adopted and maintained must-carry, retransmission consent and program exclusivity policies to preserve the viability of local television stations and their ability to serve their local communities with a high quality mix of network and local programming. As Congress has recognized, and the Supreme Court has affirmed, the preservation of our system of free, over-the-air local broadcasting is "an important governmental interest." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662-63 (1994).

To maintain a level playing field, the well-established carriage, retransmission consent and program exclusivity policies applicable to traditional multichannel video providers should apply in a comparable manner to new competitors providing comparable video services that will be licensed under the proposed national franchise. Broadcasters therefore strongly support the extension of must-carry, retransmission consent and program exclusivity policies to MVPDs that will be franchised under this legislation. We understand that the legislation does extend these policies, as the new Section 630(j) of the Communications Act states that only a very limited number of specified provisions "shall not apply to cable operators franchised under this section." Because must carry, retransmission and program exclusivity are not specified among these inapplicable provisions, they must accordingly apply to cable operators franchised under this new legislation.

The Marketplace Congress Created for Retransmission Consent Works as Intended to the Benefit of MVPDs, Broadcasters and, Most Importantly, Consumers

Because broadcasters support promotion of a more competitive video marketplace, we support Congress' 1992 action creating a marketplace in which broadcasters have the opportunity to negotiate for compensation for MVPDs' use of their signals to attract paying subscribers. As the FCC recently concluded, retransmission consent has fulfilled Congress' purpose for enacting it and has benefited broadcasters, MVPDs and consumers alike.

Prior to the Cable Television Consumer Protection and Competition Act of 1992, cable operators were not required to seek the permission of a broadcaster before carrying its signal and were certainly not required to compensate the broadcaster for the value of its signal. At a time when cable systems had few channels and were limited to an antenna function of improving the reception of nearby broadcast signals, this lack of recognition for the rights broadcasters possess in their signals was less significant. However, the video marketplace changed dramatically in the 1970s and 1980s. Cable systems began to include not only local signals, but also distant broadcast signals and the programming of cable networks and premium services. Cable systems started to compete with broadcasters for national and local advertising revenues, but were still allowed to use broadcasters' signals – without permission or compensation – to attract paying subscribers.

By the early 1990s, Congress concluded that this failure to recognize broadcasters' rights in their signals had "created a distortion in the video marketplace." S. Rep. No. 92, 102d Cong., 1st Sess. at 35 (1991) (*Senate Report*). Using the revenues they obtained from carrying broadcast signals, cable systems had supported the creation of cable

programming and services and were able to sell advertising on these cable channels in competition with broadcasters. Congress concluded that public policy should not support "a system under which broadcasters in effect subsidize the establishment of their chief competitors." *Id*. Noting the continued popularity of broadcast programming, Congress also found that a very substantial portion of the fees that consumers pay to cable systems is attributable to the value they receive from watching broadcast signals. *Id*. To remedy this "distortion," Congress in the 1992 Cable Act gave broadcasters control over the use of their signals and permitted broadcasters to seek compensation from cable operators and other MVPDs for carriage of their signals. *See* 47 U.S.C. § 325.

In establishing retransmission consent, Congress intended to create a "marketplace for the disposition of the rights to retransmit broadcast signals." *Senate Report* at 36. Congress stressed that it did not intend "to dictate the outcome of the ensuing marketplace negotiations" between broadcasters and MVPDs. *Id*. Congress correctly foresaw that some broadcasters might determine that the benefits of carriage were sufficient compensation for the use of their signals by cable systems. *Id*. at 35. Some broadcasters would likely seek monetary compensation, while others, Congress explained, would "negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system." *Id*. at 36.

Thus, even at the outset, Congress correctly recognized that, in marketplace negotiations between MVPDs and broadcasters, stations could appropriately seek a variety of types of compensation for the carriage of their signals, including cash or carriage of other programming. And while retransmission consent does not guarantee that a broadcaster will receive fair compensation from an MVPD for retransmission of its signal, it does provide a broadcaster with an opportunity to negotiate for compensation.

The FCC Recently Recommended that No Revisions Be Made to Retransmission Consent Policies

After some years' experience with retransmission consent, Congress in late 2004 asked the FCC to evaluate the relative success or failure of the marketplace created in 1992 for the rights to retransmit broadcast signals. This evaluation shows that MVPDs' complaints about retransmission consent disadvantaging them in the marketplace or somehow harming competition are groundless. In its September 2005 report to Congress about the impact of retransmission consent on competition in the video marketplace, the FCC concluded that the retransmission consent rules did not disadvantage MVPDs and have in fact fulfilled Congress' purposes for enacting them. The FCC accordingly recommended no revisions to either statutory or regulatory provisions relating to retransmission consent. FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 2005) (*FCC Report*).

In its report, the FCC concluded that local television broadcasters and MVPDs conduct retransmission consent negotiations on a "level playing field." *Id*. at ¶ 44. The FCC observed that the retransmission consent process provides incentives for both broadcasters and MVPDs to reach mutually beneficial arrangements and that both parties in fact benefit when carriage is arranged. *Id*. Most importantly, according to the FCC, consumers benefit by having access to the broadcasters' programming carried via MVPDs. *Id.* Overall, the retransmission consent rules have, as Congress intended, resulted in broadcasters being compensated for the retransmission of their stations by MVPDs and MVPDs obtaining the right to carry broadcast signals. *Id*.

Given these conclusions, the FCC recommended no changes to current law providing for retransmission consent rights. Moreover, the FCC explained that the retransmission consent rules are part of a "carefully balanced combination of laws and regulations governing carriage of television broadcast signals." *Id*. at ¶ 45. Thus, if

Congress were to consider proposals to restrict broadcasters' retransmission consent compensation, the FCC cautioned that review of other rules, including must carry and copyright compulsory licensing, would be necessary as well "to maintain a proper balance." *Id*. at ¶¶ 33, 45.

MVPDs' Complaints about Retransmission Consent Are Groundless

Especially in light of this recent FCC report, the various repetitive complaints of MVPDs about the alleged unfairness of retransmission consent ring hollow. For instance, some cable operators have complained about the retransmission consent fees purportedly extracted from them by broadcasters. These complaints are especially puzzling because, as the FCC recently reported, cable operators have in fact consistently refused to pay cash for retransmission consent. *FCC Report* at ¶¶ 10, 35. As a result, most retransmission consent agreements have involved "a cable operator providing in-kind consideration to the broadcaster," and cash is not yet "a principal form of consideration for retransmission consent." *Id*. at ¶ 10. This in-kind consideration has included the carriage of affiliated nonbroadcast channels or other consideration, such as the purchase of advertising time, cross-promotions and carriage of local news channels. *Id*. at ¶ 35.

Given that cable companies have rarely paid cash for retransmission consent of local broadcast signals, this Committee should reject any MVPD claims that broadcasters' retransmission consent fee requests are unreasonable or are somehow the cause of cable rates that for years have increased at more than double the rate of inflation. In fact, in late 2003, a GAO study did not find that retransmission consent has lead to higher cable rates. *See* GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 at 28-29; 43-44 (Oct. 2003). In contrast, the two GAO studies discussed above showed the lack of competition to cable operators, especially by wireline providers, to be a significant cause of higher cable rates.

Complaints from MVPDs that some broadcasters attempt in retransmission consent negotiations to obtain carriage for additional programming channels are ironic, to say the least. As the FCC found, broadcasters began to negotiate for carriage of additional program streams in direct response to cable operators' refusal to pay cash for retransmission consent of broadcast signals. *FCC Report* at ¶ 10. Certainly any claims that cable operators somehow have been forced to carry unwanted programming as the result of retransmission consent are disingenuous. Under the retransmission consent regime, no cable operator is compelled to carry *any* channel, whether a local broadcast channel or an allegedly "bundled" programming channel. And if a cable operator prefers not to carry any channel beyond a broadcaster's local signal, cash alternatives are offered in retransmission consent negotiations. For example, EchoStar recently completed negotiations with Hearst-Argyle Television for a cash-only deal at a marketplace rate. Accordingly, there is no merit to allegations that broadcasters force MVPDs to carry indecent programming or that they limit MVPDs' ability to offer "family friendly" tiers.

Clearly, MVPDs want to have their retransmission cake and eat it too. In one breath, MVPDs complain that broadcasters are unreasonable in requesting cash payment for carriage of their local signals; in the next, they assert that negotiating for carriage of additional programming is also unreasonable. In essence, MVPDs argue that retransmission consent is somehow inherently invalid because broadcasters should give their signals to MVPDs without compensation in any form. But there is no legal, factual or policy reason that broadcasters – unique among programming suppliers – should be singled out not to receive compensation for the programming provided to MVPDs, especially given MVPDs' increasing competition with broadcasters for advertising revenue. Indeed, when enacting retransmission consent, Congress noted that cable operators pay for the cable programming they offer to customers and that programming services originating on broadcast channels should be treated no differently. *Senate Report* at 35.

Some cable operators have also presented an inaccurate picture of the video marketplace by contending that, in rural areas and smaller markets, powerful broadcast companies have undue leverage in retransmission consent negotiations with local cable operators. This is not the case. The cable industry as a whole is concentrated nationally and clustered regionally and is dominated by a smaller and smaller number of larger and larger entities. *See Twelfth Annual Report* at ¶¶ 152, 154. This consolidation will only continue assuming that the pending acquisition of Adelphia Communications by Comcast and Time Warner is approved. In contrast, a strict FCC duopoly rule continues to prohibit broadcast television station combinations in medium and small markets. In fact, a majority of cable subscribers in Designated Market Areas 100+ are served by one of the four largest cable MSOs, while only about three percent of the television stations in these markets are owned by one of the top ten television station groups. Thus, in many instances in these 100+ markets, small broadcasters – which are facing severe financial pressures -- must deal with large nationally and regionally consolidated MVPDs in retransmission consent negotiations. In sum, local broadcasters in medium and small markets do not possess unfair leverage over increasingly consolidated cable operators.

Indeed, in small and large markets alike, nationally and regionally consolidated MVPDs have been able to exert considerable market power in retransmission consent negotiations, at the expense of local broadcasters. In actual retransmission consent agreements, broadcasters have frequently had to accept a number of egregious terms and conditions, especially with regard to digital carriage.

For example, it is not uncommon for MVPDs in retransmission agreements to refuse to carry a station's multicast digital signal that contains any religious programming and/or any programming that solicits contributions, such as telethons or other charitable fundraising programming. MVPDs have refused to carry any digital multicast signal unless the channel is broadcasting 24 hours a day, seven days a week. This requirement is very difficult for most digital stations (especially small market ones) to meet, and thereby makes it virtually impossible for many stations to obtain carriage of digital multicast signals. Under other retransmission agreements, the MVPD agreed to carry only the high definition portion of a broadcast station's digital signal, and the carriage of any portion of the broadcaster's non-high definition digital signal (including even the primary digital signal) remained entirely at the discretion of the MVPD. Other MVPDs have declined to carry the primary digital signals of non-big four network affiliated stations, unless these stations achieved certain viewer rankings in their local markets. Thus, the digital signals of many stations, including WB/UPN affiliates, Hispanic-oriented stations, religious stations and other independent stations, would not be carried by these MVPDs. It seems highly unlikely that broadcasters would accept such disadvantageous provisions in retransmission agreements, unless the MVPDs had sufficient market power so as to insist on such provisions.

In light of these real-world examples, Congress should skeptically view any complaints from MVPDs as to how they are at the mercy of powerful broadcasters in marketplace retransmission consent negotiations. The current retransmission consent rules also already protect all MVPDs by imposing an affirmative obligation on broadcasters to negotiate in good faith and providing a mechanism to enforce this obligation. *See* 47 C.F.R. § 76.65. In fact, EchoStar was the complainant in the only "good faith" case to be decided on the merits by the FCC. In that case, the broadcaster was completely exonerated, while EchoStar was found to have abused the FCC's processes. *EchoStar Satellite Corp. v. Young Broadcasting, Inc*., 16 FCC Rcd 15070 (2001). Unwarranted MVPD complaints about retransmission consent certainly cannot undermine the FCC's conclusion that MVPDs are not disadvantaged by the existing retransmission consent process. *See FCC Report* at ¶ 44.

Some parties have suggested that Congress require baseball style arbitration for retransmission consent negotiations between broadcasters and MVPDs. While this may

seem like a plausible approach at first blush, when one considers the complexity of retransmission consent negotiations, it is clear that arbitration is not a viable option. This arbitration suggestion implicitly assumes that retransmission consent negotiations are only about money, and that one should be able to choose the offer of one side or the other. That is not the case. In fact, these negotiations may involve such issues as program insertion options given to the MVPD, spot sales by the broadcaster, fiber runs between transmitter and headends, promotion spot guarantees, channel position and tier placement, DTV channel carriage, system expansion options, distribution and construction costs, studio/personnel/equipment sharing, electronic program guide placement and news insertion options, to name but a few. Particularly when, as noted above, there is no evidence that the current free market negotiation process fails to serve the public, Congress should resist the call from MVPDs for a new federal mandate to interfere with the marketplace.

Consumers Benefit from the Retransmission Consent Process

Finally, I would like to elaborate on the FCC's conclusion in its report that retransmission consent has benefited the viewing public, as well as broadcasters and MVPDs. As the FCC specifically noted, broadcasters' ability to negotiate carriage of additional programming through retransmission consent benefits viewers by increasing consumers' access to programming, including local news channels. *See FCC Report* at ¶ 35. One excellent example is our company's NewsChannel 8 here in the Washington metropolitan area. NewsChannel 8 is a local cable news network that has expanded as a result of retransmission consent negotiations over the carriage of Allbritton's television station WJLA-TV. It provides local news, weather and public affairs programming, along with coverage of local public events. Further, this programming is zoned separately to better serve viewers in Washington, D.C., the Maryland suburbs and Northern Virginia.

Similarly, Belo used retransmission consent to obtain carriage of its regional cable news channel NorthWest Cable News (NWCN) on cable systems serving over two million households in Washington, Oregon, Idaho, Montana, Alaska and California. NWCN provides regional up-to-the minute news, weather, sports, entertainment and public affairs programming to viewers across the Northwest. These efforts are coordinated with Belo's television stations in Seattle, Portland, Spokane and Boise.

In addition to local news channels, broadcasters have used retransmission consent to provide local weather information on separate channels carried by cable systems. For example, LIN Television provides these local weather channels in several markets, including ones with a history of frequent weather emergencies such as Indianapolis. Broadcasters have moreover used retransmission consent negotiations to obtain carriage of their digital signals, thereby both benefiting viewers and, according to the FCC, furthering the digital transition. *See FCC Report* at ¶ 45.

Not only has retransmission consent encouraged broadcasters to create and launch these local news and weather programming services for carriage on cable systems, retransmission consent promotes localism in other ways. In particular, allowing local broadcasters to negotiate in the marketplace for compensation for the fair value of their signals helps local stations remain competitive in the face of competition from dozens, or even hundreds, of non-local cable and satellite channels in their markets. It also at least potentially provides revenues to help stations better fulfill their obligations to serve their local communities and their viewers.

Congress Should Reject Demands to Interfere with Free Market Negotiations for Retransmission Consent

As my testimony makes clear, Congress intended in the 1992 Cable Act to give broadcasters the opportunity to negotiate in the marketplace for compensation from

MVPDs retransmitting their signals. The FCC concluded just last September that retransmission consent has fulfilled Congress' purposes for enacting it, and recommended no changes to either statutory or regulatory provisions relating to retransmission consent. This Subcommittee should accept the FCC's conclusion and continue to let broadcasters and MVPDs negotiate in the marketplace for retransmission consent. Especially in light of the FCC's conclusion that local broadcasters and MVPDs generally negotiate on a "level playing field," *FCC Report* at ¶ 44, Congress has no basis for usurping the free functioning of the retransmission consent marketplace, as certain cable and satellite operators self-interestedly urge. Indeed, to do so would undermine the benefits that consumers gain from a well functioning retransmission consent market. Thank you for your time and attention.

RETRANSMISSION CONSENT AND EXCLUSIVITY RULES: REPORT TO CONGRESS PURSUANT TO SECTION 208 OF THE SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT OF 2004

September 8, 2005

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I. INTRODUCTION

1. The Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA")[1] directs the Commission, within nine months after enactment, to complete an inquiry and submit a report to Congress "regarding the impact on competition in the multichannel video programming distribution market of the current retransmission consent, network non-duplication, syndicated exclusivity, and sports blackout rules, including the impact of those rules on the ability of rural cable operators to compete with direct broadcast satellite ("DBS") industry in the provision of digital broadcast television signals to consumers."[2] SHVERA also directs the Commission to "include such recommendations for changes in any statutory provisions relating to such rules as the Commission deems appropriate."[3]

2. In accordance with this directive, the Media Bureau issued a Public Notice on January 25, 2005, requesting comment, information, and analysis on how the retransmission consent, network non-duplication, syndicated exclusivity, and sports blackout rules affect competition, both generally and specifically, in the multichannel video programming distribution ("MVPD") market.[4] The Notice also sought comment on the impact of these rules on rural cable operators' ability to compete with DBS operators in the provision of digital broadcast signals. In this Report, we address and analyze the comments we received and discuss potential areas for Congressional action.[5] At this time, we find that it is not necessary to recommend specific statutory amendments.

II. BACKGROUND

3. Carriage of the signals of broadcast television stations and the content contained in those signals is governed by three separate but interrelated regimes: (1) the retransmission consent and mandatory carriage provisions of the Communications Act of 1934, as amended (the "Act"), which govern carriage of television broadcast signals by cable and DBS operators;[6] (2) copyright law, which protects copyrighted material within broadcast signals;[7] and (3) the Commission's exclusivity rules, which protect exclusive rights to distribute certain content.[8] We discuss below the provisions of the Act and Commission regulations at issue in this report. In addition, to the extent relevant to our analysis, we address certain aspects of the copyright laws governing retransmission of the copyrighted material in

[1] Pub. L. No. 108-447, 118 Stat. 2809 (2004). SHVERA was enacted on December 8, 2004.

[2] *Id.* at § 208.

[3] *Id.*

[4] *Media Bureau Seeks Comment for Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace*, 20 FCC Rcd 1572 (2005) (Public Notice).

[5] The Appendix lists the commenters in this proceeding and the acronyms used to refer to them.

[6] *See* Communications Act of 1934, as amended ("Communications Act"), 47 U.S.C. §§ 325, 338-40, 534-35, 543, 548; 47 C.F.R § 76.55-62 (cable must carry); 47 C.F.R. § 76.64 (cable retransmission consent); 47 C.F.R. § 76.66 (DBS signal carriage).

[7] Copyright Act of 1976 ("Copyright Act"), 17 U.S.C. §§ 111, 119, 122.

[8] 47 C.F.R. § 76.92-76.95 (cable network non-duplication); 47 C.F.R. § 76.101-110 (cable syndicated exclusivity); 47 C.F.R. § 76.111 (cable sports blackout); 47 C.F.R. § 76.120 (satellite definitions related to exclusivity); 47 C.F.R. § 76.122 (satellite network non-duplication); 47 C.F.R. § 76.123-76.125 (satellite syndicated exclusivity); 47 C.F.R. § 76.127 (satellite sports blackout); 47 C.F.R. § 76.128 (application of cable and satellite sports blackout rules); 47 C.F.R. § 76.130 (satellite substitution for blacked out programming).

television broadcast signals.

A. Retransmission Consent and Mandatory Carriage

4. As described below, the laws and regulations governing carriage of broadcast signals were enacted or adopted over a number of years. While the rules differ somewhat for cable and satellite providers, pursuant to statutory directive, the Commission has adopted rules for satellite providers regarding mandatory carriage of broadcast signals and retransmission consent that closely parallel the requirements for cable providers.[9]

5. *Cable*. Originally, the primary function of cable television was to facilitate reception of local television stations by persons who could not receive a satisfactory over-the-air signal because of their location.[10] Cable television transmission evolved into providing signals from distant television stations to areas where the signals would not otherwise be available over the air. The majority of cable television programming initially consisted of the retransmission of signals broadcast by others rather than programs originated by cable systems or other non-broadcasters.[11] Today, most cable programming originates from sources other than over-the-air broadcast signals.

6. As the cable industry grew, disputes arose between cable operators and copyright owners of broadcast material regarding whether cable operators were entitled to retransmit the material contained in a broadcaster's signal without first obtaining a copyright license.[12] In 1976, in order to address the tensions between cable operators and copyright owners, Congress revised the Copyright Act.[13] Pursuant to the amendments, unlicensed retransmission of the copyrighted material in a broadcast signal constitutes copyright infringement.[14] Cable systems were granted a statutory or compulsory license for the retransmission of all local broadcast signals and distant signals that the Commission permitted them to

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[9] *See Implementation of the Satellite Home Viewer Improvement Act 1999: Broadcast Signal Carriage Issues, Retransmission Consent Issues*, 16 FCC Rcd 1918 (2000) ("*SHVIA Signal Carriage Order*"); *Technical Standards for Determining Eligibility For Satellite-Delivered Network Signals Pursuant To the Satellite Home Viewer Improvement Act*, 15 FCC Rcd 24321 (2000); *Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules To Satellite Retransmissions of Broadcast Signals*, 15 FCC Rcd 21688 (2000) ("*Satellite Exclusivity Order*"); *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445 (2000) ("*SHVIA Good Faith Order*"); *Implementation of the Satellite Home Viewer Improvement Act of 1999, Enforcement Procedures for Retransmission Consent Violations*, 15 FCC Rcd 2522 (2000).

[10] Melville B. Nimmer and David Nimmer, NIMMER ON COPYRIGHT § 8.18 (2005).

[11] *Id.*

[12] *Id. See, e.g., Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974) (development and implementation of new functions, such as program origination, sale of commercials and interconnection, does not convert an entire cable system, regardless of distance from the broadcasting station, into a "broadcast function" subjecting the cable operator to copyright infringement liability; importation of "distant" signals from one community into another does not constitute a "performance" under the Copyright Act); *Fortnightly v. United Artists*, 392 U.S. 390 (1968) (cable operator retransmitting signals of television stations—including plaintiff's copyrighted programming—did not "perform" within purview of Copyright Act and therefore did not infringe plaintiff's copyrights).

[13] *See* Pub. L. No. 94-553, 90 Stat. 2541 (1976); *see also* 17 U.S.C. § 101 *et seq.*

[14] *See* 17 U.S.C. § 111(b).

carry.[15] The compulsory licensing scheme established by the 1976 amendments took into consideration the Commission's rules that: (1) defined the term "local broadcast station;" (2) limited to some degree the number of distant signals that a cable operator could import (the distant signal rule);[16] (3) permitted a local broadcaster to require a cable operator to delete duplicative programming for which the station had obtained exclusive rights (the network non-duplication and syndicated exclusivity rules); and (4) required the carriage of certain signals.[17]

7. Historically, the Commission's rules provided mandatory carriage rights to local broadcast stations and permitted carriage of distant broadcast signals.[18] Local stations were defined in terms of mileage zones around the station's community of license, generally 35 or 55 miles, depending on the market size, or by Grade B contours, areas that approximated the area reached by the station's over-the-air signal. In addition, certain out-of-market stations were deemed "significantly viewed" based on over-the-air viewing and treated as local for carriage purposes. The Commission's mandatory carriage rules were twice struck down by the Court of Appeals as violating the First Amendment.[19]

8. The repeal of the Commission's must-carry rules led Congress to enact provisions in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"), which established mandatory carriage of television broadcast stations within their local markets.[20] In adopting the mandatory carriage provisions of the 1992 Act, Congress recognized the importance of local television broadcast stations as providers of local news and public affairs programming.[21] Congress found that cable service was rapidly penetrating television households, and increasingly was competing with free over-the-air television for advertising dollars.[22] Congress recognized that television broadcast stations rely on advertising dollars to provide free over-the-air local service and that competition from cable television posed a threat to the economic viability of television broadcast stations. It therefore mandated cable

[15] *See* 17 U.S.C. § 111(c). Under the compulsory license, cable systems are not required to obtain the consent of the copyright owners of copyrighted material contained in the broadcast signal being retransmitted or negotiate license fees for the use of such copyrighted material, but, instead, must pay government-established fees for the right to retransmit copyrighted material contained in broadcast programming. 17 U.S.C. § 111(d). The 1976 amendments established that fees payable to copyright owners for compulsory licenses would be based on a percentage of each cable system's gross revenues and would be adjusted periodically by the newly formed Copyright Royalty Tribunal. *Id. see also* 17 U.S.C. § 801(b).

[16] 47 C.F.R. §§ 76.59(b), 76.61(b)-(c) (repealed 1980); 17 U.S.C § 111.

[17] 47 C.F.R. §§ 76.92, 76.101; 17 U.S.C. § 111(d).

[18] *See First Report and Order in Dockets 14895 and 15233,* 38 FCC 683 (1965) ("*1965 Network Exclusivity Order*"); *Second Report and Order in Dockets 14895, 15233 and 15971,* 2 FCC 2d 725 (1966) ("*1966 Network Exclusivity Order*").

[19] *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985) (striking down the Commission's 1972 must carry rules set forth in 36 FCC 2d 143 (1972)); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) (striking down the Commission's 1986 must carry rules set forth in 1 FCC Rcd 864 (1986)).

[20] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992); H. Rep. No. 628, 102d Cong., 2d Sess. 1 (1992) ("*House Report*"); S. Rep. No. 92, 102d Cong., 1st Sess. 1 (1991) ("*Senate Report*").

[21] House Committee on Energy and Commerce, H.R. Conf. Rep. No. 102-862 ("*Conference Report*"), 102d Cong., 2d Sess. (1992), reprinted at 138 Cong. Rec. H8308 (Sept. 14, 1992) at 2.

[22] *Conference Report* at 3.

carriage to ensure the continued economic viability of free local broadcast television.[23]

9. In the 1992 Act, Congress also granted broadcasters retransmission consent rights. Prior to the 1992 Act, cable operators were not required to seek the permission of a broadcaster before carrying its signal nor were they required to compensate the broadcaster for the value of its signal. Congress found that this created a "distortion in the video marketplace which threatens the future of over-the-air broadcasting."[24] Congress acted to remedy the situation by giving broadcasters control over the use of their signals and permitting broadcasters to seek compensation from cable operators and other MVPDs for carriage of their signals. Congress noted that some broadcasters might find that carriage itself was sufficient compensation for the use of their signal by an MVPD while other broadcasters might seek monetary compensation and still others might negotiate for in-kind consideration such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system. Congress emphasized that it intended "to establish a marketplace for the disposition of the rights to retransmit broadcast signals" but did not intend "to dictate the outcome of the ensuing marketplace negotiations."[25]

10. During the first round of retransmission consent negotiations, broadcasters initially sought cash compensation in return for retransmission consent.[26] However, most cable operators—particularly the largest multiple system operators ("MSOs")—were not willing to enter into agreements for cash, and instead sought to compensate broadcasters through the purchase of advertising time, cross-promotions, and carriage of affiliated channels.[27] Many broadcasters were able to reach agreements that involved in-kind compensation by affiliating with an existing non-broadcast network[28] or by securing carriage of their

[23] *Conference Report* at 3.

[24] *Senate Report* at 35.

[25] *Senate Report* at 36.

[26] *See, e.g.*, Disney Reply Comments at 7-9; NAB Comments at 19; Network Affiliates Comments at 7-8; Fox Reply Comments at ii, 4-5; NAB Reply Comments at 9-11. *See also* Ted Sherman, *Consumers Loom as Losers in Battle Between Cable, Broadcast Firms*, THE NEWARK STAR-LEDGER, Sept. 13, 1993 (noting that after 1992 Act established retransmission consent requirements, "[a]lmost every broadcaster initially demanded the cash [and] at the same time, nearly all cable operators said no, threatening to dump the on-air broadcast stations come Oct. 6, when the [retransmission consent] provision takes hold"); Mark Robichaux, *Tele-Communications Says It Will Fail to Meet Deadline on TV Stations' Fees*, THE WALL STREET JOURNAL, Aug. 18, 1993, at B8 ("Delays in meeting the October deadline have been caused in part by the face-off between TV stations demanding new cash fees and cable systems steadfastly refusing to pay.").

[27] *See* Disney Reply Comments at 7-9; NAB Comments at 19; NAB Reply Comments at 9-11; Network Affiliates Comments at 7-8; Fox Reply Comments at 5. *See also* Robichaux, n. 26, *supra* ("Nearly all of the nation's largest cable operators have vowed to forgo paying cash to local TV stations."); Michael Burgi, *TV Ratings Companies Brace For Retransmission Fallout*, MEDIA WEEK, Jun. 28, 1993 ("'. . . we can foresee no circumstances where we would pay cash,' said Richard Aurelio, president of Time Warner Cable in New York, referring to the FCC retransmission consent decree . . ."); Mark Robichaux, CABLE COWBOY: JOHN MALONE AND THE RISE OF THE MODERN CABLE BUSINESS (John Wiley & Sons, Inc. 2002) ("TCI, for one, refused to pay cash to any of the big networks but it indicated it might be willing make room on its systems for a new cable channel a broadcaster might like to start.").

[28] *See* Wayne Friedman, *Tribune Time*, INSIDE MEDIA, Oct. 6, 1993 (Tribune's partnership with the fledgling TV Food Network "was put together mainly to negotiate retransmission consent with cable systems").

own newly-formed non-broadcast networks.[29] Broadcast stations that insisted on cash compensation were forced to either lose cable carriage or grant extensions allowing cable operators to carry their signals at no charge until negotiations were complete.[30] Twelve years later, cash still has not emerged as a principal form of consideration for retransmission consent. Today, virtually all retransmission consent agreements involve a cable operator providing in-kind consideration to the broadcaster.[31]

11. Within local market areas,[32] commercial television stations may elect cable carriage under either the retransmission consent or mandatory carriage requirements created by the 1992 Act.[33] As a general rule, the 1992 Act requires cable operators to obtain authorization before they carry the signal of commercial television stations, either directly through retransmission consent, or through the invocation

[29] *See* Disney Reply Comments at 8; NAB Reply Comments at 9. The new broadcast-affiliated MVPD networks included Fox's FX, ABC's ESPN2, and NBC's America's Talking, which later became MSNBC. Disney Reply Comments at 8; *see also* Sherman, n. 26, *supra.*

[30] CBS, which maintained a cash compensation strategy longer than other broadcasters, authorized retransmission consent to cable operators without compensation for one year while negotiations continued. *See* Barry Layne, *No Fade to Black Under Retrans,* HOLLYWOOD REPORTER, Oct. 7, 1993. Major network affiliates were removed from TCI cable systems in Corpus Christi, Texas for over one month as negotiations continued. *Battle Over Carriage Ends in Corpus Christi,* CABLE WORLD, Nov. 22, 1993. Other stations were removed from cable systems in Grand Rapids, and Michigan, Portland, Maine. *At Deadline,* MEDIA WEEK, Oct. 11, 1993. *See also,* Jeannine Aversa, Rachel W. Thompson & Rod Granger, *Storm Still Brews in Conn. as FCC Readies Final Must-Carry Rules,* MULTICHANNEL NEWS, Mar. 8, 1993 (noting Cablevision's threat to drop several broadcast stations, including those in Boston and Hartford/New Haven "if they don't forgo payment for carriage").

[31] *See General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control,* 19 FCC Rcd 473 at 503 ¶ 56 (2004) ("*News-Hughes Order*") (study shows most broadcasters have opted for, or settled for, in-kind compensation from cable operators in exchange for retransmission consent (citing FCC, OPP Working Paper #37, *Broadcast Television: Survivor in a Sea of Competition* at 29)); *id.* at 555 ¶ 180 (the "price" an MVPD is willing to pay for carriage of a local broadcast station is more likely to be structured in the form of an "in kind" payment whereby the MVPD provides channel capacity for a broadcast network's affiliated cable programming network and/or other carriage-related concessions (citing *SHVIA Good Faith Order,* 15 FCC Rcd at 5462 ¶ 38).

[32] The Commission is required to define local markets by using commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. § 534(h)(1)(C). The Commission first used Arbitron's areas of dominant influence (ADIs) and subsequently adopted Nielsen Media Research's designated market areas (DMAs) to define local markets. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* 8 FCC Rcd 2965, 2975-76 ¶¶ 37-41 (1993) ("*Signal Carriage Order*") (defining markets using ADIs); *Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules, Implementation of Section 301(d) of the Telecommunications Act of 1996, Market Determinations,* 11 FCC Rcd 6201 (1996) (defining local markets using Nielsen DMAs after Arbitron ceased publication of television data). Local markets for purposes of cable carriage tend to be larger, on average, than the areas served by a station's over-the-air signal.

[33] Cable operators that are subject to rate regulation are required to provide subscribers with a basic service tier and to carry local broadcast stations on that tier. 47 U.S.C. § 543(b)(7), 47 C.F.R. § 76.901. In order to receive mandatory carriage on a cable system, a station must provide the cable system with a good quality signal, and its programming must not be substantially duplicative of the programming of another station carried by the cable system. 47 C.F.R. § 76.55(c)(3); 47 C.F.R. § 76.56 (b)(5).

of mandatory carriage.[34]

12. *Satellite.* While the first cable carriage rules were adopted by the Commission over 40 years ago,[35] the satellite carriage rules were adopted much more recently. Satellite television began primarily as a rural service to provide non-broadcast signals to households in areas that could not otherwise receive such signals because cable service was unavailable. In 1988, Congress enacted the Satellite Home Viewer Act ("SHVA"), the first satellite compulsory copyright law.[36] It granted direct-to-home ("DTH")[37] satellite providers a compulsory copyright license to retransmit television signals of distant network stations[38] to "unserved households"[39] and superstations (non-network stations) to any

[34] 47 U.S.C. § 325. Noncommercial television stations have a right to mandatory carriage under the 1992 Act, but do not have statutory retransmission consent rights. Sections 614 and 615 of the Communications Act contain the cable television "must carry" requirements for commercial and noncommercial television stations, respectively.

[35] *See Carter Mountain Transmission Corp.*, 32 FCC Rcd 459 (1962), *aff'd sub. nom., Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir. 1963), *cert. denied,* 375 U.S. 951 (1963), in which the Commission concluded that providing a cable system with a distant signal that duplicated the programming of the only local television station would have an adverse economic impact on that station. After *Carter*, the Commission initiated a rulemaking proceeding that eventually resulted in the adoption of the Commission's first cable television rules. *See 1965 Network Exclusivity Order*, 38 FCC 683. A year later, the Commission asserted jurisdiction over all cable systems and further expanded the rules. *See 1966 Network Exclusivity Order*, 2 FCC 2d 725.

[36] The Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935, Title II (1988) ("SHVA"); 17 U.S.C. § 119.

[37] The DTH industry was originally comprised mainly of Home Satellite Dish (HSD) providers, who offered consumers home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS service, which uses small dishes operating on other frequencies, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from licensed program packagers. DBS is now the most widely-used means for individuals to receive satellite programming. DirecTV and the DISH Network (owned and operated by EchoStar) are DBS carriers currently providing nationwide service.

[38] "Network stations" are generally television broadcast stations owned or operated by, or affiliated with, one or more of the television networks. *See* 47 U.S.C. § 339(d)(3) (stating that "network station" for purposes of this section is defined by the Copyright Act); 17 U.S.C § 119(d)(2) ("The term 'network station' means – (A) a television broadcast station, including any translator station or terrestrial satellite stations that rebroadcasts all or substantially all of the programming broadcast by a network station, that is owned or operated by, or affiliated with, one or more of the television networks in the United States which offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States; or (B) a noncommercial educational broadcast station . . .").

[39] 17 U.S.C. §119(a)(1), (2). Section 119(d)(10)(A) of the Copyright Act defines an unserved household as a "household that cannot receive, through use of a conventional stationary, outdoor rooftop receiving antenna, an over-the-air signal of a primary network television station affiliated with that network of Grade B intensity as defined by the Federal Communications Commission under section 73.683(a) of title 47 of the Code of Federal Regulations, as in effect on January 1, 1999." An unserved household can also be one that is subject to one of four statutory waivers or exemptions. *See* 17 U.S.C. § 119(d)(10)(B)-(E). *See also* 47 USC § 325(b)(2)(C) (providing an exemption from retransmission consent requirements for satellite carriage of network stations to unserved households), as amended by section 201 of the SHVERA (extending exemption from December 31, 2004 to December 31, 2009).

household.[40] The license authorized by SHVA, codified as section 119 of the Copyright Act, generally applies to the signals of superstations and network stations retransmitted by satellite carriers to the public for private home viewing, and the license to retransmit the signals of network stations is further limited to persons who are in "unserved households."[41]

13. During the mid- to late-1990s, the satellite industry evolved and found more success in marketing service to subscribers. In 1999, Congress enacted the Satellite Home Viewer Improvement Act ("SHVIA"), which extended the compulsory copyright license for distant signals granted to satellite carriers until December 31, 2004, and enacted a permanent compulsory copyright license for local signals. SHVIA also extended the retransmission consent exemption for satellite carriage of distant signals. Most significantly, SHVIA created a new statutory copyright license for satellite carriage of stations to any subscriber within a station's local market, without distinction between network and non-network signals or served or unserved households.[42] Retransmission consent is required for such "local-into-local" carriage.[43] Through SHVIA, Congress sought to enable satellite providers to become a viable alternative MVPD to cable operators. Congress intended SHVIA to place satellite carriers on an equal footing with local cable operators when it comes to the availability of local broadcast programming, and thus to give consumers more and better choices in selecting a multichannel video program distributor.[44]

14. Unlike cable providers, however, satellite carriers are not required to provide subscribers with a basic service tier that includes local broadcast stations under the Communications Act.[45] The statute does not require satellite carriers to carry television stations in markets where they do not choose to offer local-into-local service pursuant to the statutory license.[46] However, if a satellite carrier chooses to carry a local station in a particular DMA pursuant to the statutory copyright license, it generally must carry any qualified local television station in the same DMA that has made a timely election for mandatory

[40] Section 119(d)(9) of the Copyright Act defines "superstation" as "a television station, other than a network station, licensed by the Federal Communications Commission, that is secondarily transmitted by a satellite carrier."

[41] 17 U.S.C. § 119.

[42] The Satellite Home Viewer Improvement Act of 1999, Pub. L. No 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 ("SHVIA") (1999). SHVIA was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA") (relating to copyright licensing and carriage of broadcast signals by satellite carriers).

[43] 47 U.S.C. § 325.

[44] *See* Joint Explanatory Statement of the Committee of Conference on H.R. 1554, H.R. Conf. Rep. No. 106-464 ("*SHVIA Conference Report*"), 106th Cong., 1st Sess. (1999), reprinted at 145 Cong. Rec. H11792 (Nov. 9, 1999).

[45] 47 U.S.C. §§ 534-535. Cable operators that are subject to rate regulation are required to set aside a portion of their channel capacity, generally one third, for the carriage of commercial broadcast signals. 47 U.S.C. § 534(b), 47 C.F.R. § 76.56(b). They are required to provide each subscriber with a basic service tier, and all broadcast stations must be carried on that tier. 47 U.S.C. § 543(b)(7), 47 C.F.R. § 76.901.

[46] 47 U.S.C. § 338. *But see* § 210 of SHVERA, creating § 338(d)(4) (mandatory carriage in Alaska and Hawaii). *See also Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, MB Docket No. 05-181, FCC 05-159 (rel. Aug. 23, 2005).

carriage.[47] This is commonly referred to as the "carry one, carry all" requirement.

15. In 2004, SHVERA extended the retransmission consent exemption for distant signals to December 31, 2009. It also modified the compulsory copyright license for such signals and extended it to December 31, 2009.[48] The copyright provisions in SHVERA prohibit the retransmission of distant analog signals to unserved households where analog local-into-local service is offered, unless the subscriber was receiving the signal as of December 8, 2004, or prior to the commencement of local-into-local service. SHVERA also granted satellite carriers the right to offer Commission-determined "significantly viewed" signals to subscribers, creating a distinction between "local" though out-of-market signals and "distant" signals.[49] Pursuant to SHVERA, DBS operators were granted the right to retransmit out-of-market significantly viewed stations to subscribers in the community in which the station is deemed significantly viewed, provided the local station affiliated with the same network as the significantly viewed station is offered to subscribers.[50] SHVERA provided that, as in the cable context, satellite carriers would pay reduced copyright royalty fees for retransmission of significantly viewed stations.[51] Satellite carriers are not required to carry out-of-market significantly viewed stations, and, if they do carry them, retransmission consent is required.

16. SHVERA expands the copyright license to make express provision for distant digital signals. In general, if a satellite carrier offers local-into-local digital signals in a market, it is not allowed to offer distant digital signals to subscribers in that market, unless it was offering such distant digital signals prior to commencing local-into-local digital service. If a household is predicted to be unserved by the analog signals of a network station, it can qualify for the distant digital signal of the network with which the station is affiliated if it is offered by the subscriber's satellite carrier. If the satellite carrier offers local-into-local analog service, a subscriber must receive that service in order to qualify for distant digital signals. A household that qualifies for distant signal service can receive only signals from stations located in the same time zone or in a later time zone, not in an earlier time zone. SHVERA also provides

[47] 47 U.S.C. § 338. Satellite carriers are not required to carry a station if its programming is duplicative of the programming of another station carried by the DBS provider in the DMA or if the station fails to provide a good quality signal to the DBS provider's local receive facility. *Id.*

[48] SHVERA, §§ 101(a), 201.

[49] Regarding the term "significantly viewed," section 102 of SHVERA extends the statutory copyright license contained in 17 U.S.C. § 119(a) to "apply to the secondary transmission of the primary transmission of a network station or a superstation to a subscriber who resides outside the station's local market ... but within a community in which the signal has been determined by the Federal Communications Commission, to be significantly viewed in such community, pursuant to the rules, regulati ns, and authorizations of the Federal Communications Commission in effect on April 15, 1976, applicable to determining with respect to a cable system whether signals are significantly viewed in a community." 17 U.S.C. § 119(a)(3)(A). *See also Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, 20 FCC Rcd 2983 (2005) (*"SHVERA Significantly Viewed NPRM"*).

[50] SHVERA permits a satellite carrier to privately negotiate with a local network station to obtain a waiver of the requirement that the local station be offered. 47 U.S.C. § 340(b)(4). In addition, the statutory copyright provisions contained in 17 U.S.C. § 119, as amended by SHVERA, permit subscribers to seek a waiver from the relevant local station through their satellite carrier. The statutory copyright waiver provision sunsets on December 31, 2008, on which date no further waivers will be granted and those then in effect will terminate. 17 U.S.C. § 119(a)(3)(C)(ii).

[51] SHVERA, § 102; 17 U.S.C. § 119(a). Significantly viewed stations are treated as local stations for purposes of copyright royalty fee payments.

for signal testing at a household to determine if it is "served" by a digital signal over-the-air. In some cases, if a household is shown to be unserved, it would be eligible for distant digital signals, provided the household subscribes to local-into-local analog service, if it is offered. However, this digital testing option is not available until April 30, 2006, in the top 100 television markets, and July 15, 2007, in all other television markets. Such digital tests also are subject to waivers that the Commission may issue for stations that meet specified statutory criteria.

B. Exclusivity Rules

17. A broadcaster can carry network and syndicated programming on its local television station(s) only with the permission of the networks or syndicators that own or hold the rights to that programming. In addition, the ability of broadcasters to grant retransmission consent for MVPD carriage may be governed by the network/affiliate agreement or by the syndication agreement.[52] The Commission has concluded that the network non-duplication and syndicated exclusivity rules should serve primarily as a means of enforcing contractual exclusivity agreements entered into between broadcasters, which purchase the distribution rights to programming, and networks and syndicators, which supply the programming.[53] Thus, the network non-duplication and syndicated exclusivity rules require that the broadcaster possess a legitimate exclusivity contract prior to requesting a blackout.[54] The rules may be invoked by stations that elect must carry as well as by those that elect retransmission consent in their local markets, even if they are not actually carried by the cable operator.[55] By requiring MVPDs to black out duplicative programming carried on any distant signals they may import into a local market, the Commission's network non-duplication and syndicated exclusivity rules provide a regulatory means for broadcasters to prevent MVPDs from undermining their contractually negotiated exclusivity rights. The Commission's sports blackout rule protects a sports team's or sports league's distribution rights to a live sporting event taking place in a local market. As with the network non-duplication and syndicated exclusivity rules, the sports blackout rule applies only to the extent the rights holder has contractual rights to limit viewing of sports events.

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[52] NBC states that contracts between broadcasters and networks/syndicators often contain provisions limiting the station's out-of-market redistribution of the network and syndicated programming. NBC Comments at 6-8.

[53] *Amendment of Parts 73 and 76 of the Commission's Rules Related to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299, 5316, 5319 ¶¶ 104, 118 (1988) ("*1988 Program Exclusivity Order*"), *recon. denied in pertinent part, Memorandum Opinion and Order,* 4 FCC Rcd 2711 (1989) ("*1989 Program Exclusivity Order*").

[54] 47 C.F.R. §§ 76.93, 76.103, 76.122(b), 76.123(b)-(c), 76.124. Sections 73.658(b) and (m) of the Commission's rules, 47 C.F.R. §§ 73.658(b), (m), limit the geographic area of the exclusive territory that licensed commercial television stations can obtain from a network or non-network program supplier.

[55] The extent to which must carry stations rely on the network non-duplication and syndicated exclusivity rules may be limited because of rules permitting cable and satellite carriers to decline to carry duplicating stations. Under the must carry rules, if a cable operator elects to carry just one of two local affiliates of a network, it must carry the affiliate whose community of license is closest to the cable system's headend. Also, a cable operator is not required to carry the signal of any local station that substantially duplicates the signal of another local station or to carry the signals of more than one local commercial station affiliated with a particular broadcast network. *See* 47 C.F.R. § 76.56. A satellite carrier is not required to carry any local station that substantially duplicates another local station, or more than one local commercial station affiliated with a network unless such stations are licensed to communities in different states. A satellite carrier is permitted to select which duplicating signal in a market to carry, and which network affiliate in a market to carry. *See* 47 C.F.R. § 76.66(h) (2)-(3).

1. Network Non-Duplication

18. The network non-duplication rules protect a local commercial or non-commercial broadcast television station's right to be the exclusive distributor of network programming within a specified zone, and require programming subject to the rules to be blacked out when carried on another station's signal imported by an MVPD into the local station's zone of protection.[56] A television station's rights under the network non-duplication rules are limited by the terms of the contractual agreement between the station and the holder of the rights to the program. The Commission's rules allow commercial and non-commercial television stations to protect the exclusive distribution rights they have negotiated with broadcast networks, not to exceed a specified geographic zone of 35 miles (55 miles for network programming in smaller markets).[57] For purposes of these rules, it is these specified zones that distinguish between "local" and "distant."

19. *Cable.* Network non-duplication rules for cable were first promulgated by the Commission in 1965.[58] Throughout the 1960s and 1970s the Commission continually refined the rules, but the policy behind them remained the same.[59] The purpose of the rules was to protect the exclusive contractual rights of local broadcasters in network programming from the importation of non-local network stations by cable systems and thus to provide appropriate protections and incentives to program producers and distributors to provide the programming desired by viewers.[60] Prior to 1988, network non-duplication protection applied only to programming being broadcast simultaneously in the local market by a distant signal.[61] In 1988, the Commission modified the rule to remove this limitation and extend exclusivity protection to any time period specified in the contractual agreement between the network and the

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[56] *See* 47 C.F.R. §§ 76.92 and 76.122. In addition to full power television stations, 100-watt translator stations are allowed to demand network non-duplication protection under certain circumstances. *See* 47 C.F.R. § 76.92(d).

[57] *See* 47 C.F.R. §§ 76.92 and 76.120. Section 76.51 of the rules lists the top 100 markets applicable to this rule. A station licensed to a hyphenated television market, as defined in section 76.51, is entitled to assert exclusivity, under the network non-duplication rule, within 35 miles surrounding each named city. The 35 mile specified zone, as well as all other mileage zones, used in applying the exclusivity rules, is measured from the relevant station's "reference point" in its community of license. The rules provide a list of the reference points to identify television market boundaries used for this purpose. *See* 47 C.F.R. § 76.53. For a full explanation of the relevant zone of protection for the application of the sports blackout rule, *see* 47 C.F.R. § 76.5(e). The same reference point applies to all stations licensed to the same community regardless of where their transmitters or studios are located.

[58] *See 1965 Network Exclusivity Order*, 38 FCC 683 (implementing the first non-duplication rules for cable television).

[59] *See id. See also 1966 Network Exclusivity Order*, 2 FCC 2d 725 (modifying the non-duplication rule, shortening the time period of non-duplication to one day); *First Report and Order in Docket 19995,* 52 FCC 2d 519 (1975) (exempting cable providers with less than 1,000 subscribers from network non-duplication requirements); *Memorandum Opinion and Order in Docket No. 19995,* 67 FCC 2d 1303 (1978) ("*1978 Network Exclusivity Order*") (exempting significantly viewed channels from being blacked out under network non-duplication rules); *1989 Program Exclusivity Order,* 4 FCC Rcd 2711 (1989) (modifying the notice requirement for network non-duplication and reinstating the syndicated exclusivity rules.)

[60] *See 1988 Program Exclusivity Order*, 3 FCC Rcd at 5308 ¶ 49, *recon. denied in pertinent part, 1989 Program Exclusivity Order,* 4 FCC Rcd 2711 (1989). For a complete history of the Commission's network non-duplication and syndicated program exclusivity rules, *see 1989 Program Exclusivity Order*, 4 FCC Rcd at 2711-2716 ¶¶ 5-29.

[61] *Amendment of Parts 73 and 76 of the Commission's Rules Related to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 6171 (1988) ("*Program Exclusivity FNPRM*").

affiliate.[62]

20. Because a station's zone of protection[63] under the network non-duplication rules may not exceed the area agreed upon by the station and its network or the area within which the station has acquired broadcast territorial exclusivity rights,[64] the concept of a DMA and its boundaries is entirely irrelevant for purposes of the network non-duplication rules. Thus, a station subject to program deletions could be another network affiliate in the same DMA.

21. There are several exceptions to application of the network non-duplication rules. First, because of the cost of the equipment necessary to carry out deletions, the Commission exempts cable systems having fewer than 1,000 subscribers.[65] The rule also does not apply if the out-of-market station's signal is deemed "significantly viewed" in a relevant community.[66] This exception was first adopted to ensure that cable subscribers receive the same programming that would be available to over-the-air viewers in their communities.[67]

22. *Satellite*. SHVIA required the Commission to extend the network non-duplication rule to

[62] *1988 Program Exclusivity Order*, 3 FCC Rcd at 5314 ¶ 92; 47 C.F.R. §§ 76.92 and 76.93.

[63] The cable rules governing exclusivity are applied on a community unit basis within a station's zone of protection. *See* 47 C.F.R. § 76.5(dd). Community units are political jurisdictions (*i.e.*, a city, town, or county) or portions of political jurisdictions for which a local government body has granted a franchise to operate a cable system. Since satellite carriers, unlike cable systems, do not have identifiers assigned to the communities they serve, the rules incorporate a comparable method for determining the areas to which the zone of protection applies, based on zip codes. 47 C.F.R. §§ 76.122(c)(7), 76.123(d)(4).

[64] 47 C.F.R. §§ 76.92 note (the area within which a station may enforce network non-duplication may not exceed the area within which the station may acquire territorial exclusivity rights under section 73.658(m). *See also* 47 C.F.R. § 76.93 (stations shall be entitled to exercise non-duplication rights in accordance with contractual provisions of the network-affiliate agreement.) The territorial exclusivity rules limit the area in which a broadcast station may obtain the rights to be the exclusive distributor of specific programming. Under network territorial exclusivity (47 C.F.R. § 73.658(b)), no broadcast station licensee may have an agreement that prevents another station located in a different community from broadcasting any network program. Under non-network territorial exclusivity (47 C.F.R. § 73.658(m)), a station may not have an arrangement with a non-network program supplier which prevents another station located in a community more than 35 miles away from broadcasting the same programming. Network affiliation agreements often have provisions restricting affiliates from granting retransmission consent beyond a specified area.

[65] *See* 47 C.F.R. §§ 76.95(a); *see also 1988 Program Exclusivity Order*, 3 FCC Rcd at 5314 ¶ 94.

[66] *See* 47 C.F.R. § 76.92(f).

[67] *See, e.g., 1965 Network Exclusivity Order,* 38 FCC at 720 ¶ 97; *1978 Network Exclusivity Order,* 67 FCC 2d 1303, 1304 ¶ 6 (1978).

DBS in 2000, but only with respect to the retransmission of nationally distributed superstations.[68] These nationally distributed superstations may be offered to any satellite subscriber, without the "unserved" restriction that applies to distant network stations. SHVIA directed the Commission to implement new exclusivity rules for satellite that would be "as similar as possible" to the rules applicable to cable operators.[69] In general, the network non-duplication rules apply when a satellite carrier retransmits a nationally distributed superstation to a household within a local broadcaster's zone of protection[70] and the nationally distributed superstation carries a program to which the local station has exclusive rights.[71] In contrast to the mileage-based specified zones used in the cable context, zip codes are used to determine the areas to which the zone of protection applies for satellite carriers.[72] As in the cable context, the broadcast station licensees may exercise their network non-duplication rights in accordance with the terms specified in a contractual agreement between the network and its affiliate.[73] The rules for satellite carriers also have exceptions for significantly viewed stations and for areas in which the satellite carrier has fewer than 1,000 subscribers in a protected zone.[74]

2. Syndicated Exclusivity

23. The syndicated exclusivity rules are similar in operation to the network non-duplication rules, but they apply to exclusive contracts for syndicated programming, rather than for network programming.[75] In addition, the syndicated exclusivity rules apply only to commercial stations. The syndicated exclusivity rules allow a local commercial broadcast television station or a distributor of syndicated programming to protect its exclusive distribution rights within a 35-mile geographic zone surrounding a television station's city of license, although the zone may not be greater than that provided

[68] 47 U.S.C. § 339(b). A "nationally distributed superstation" is defined as a television broadcast station, licensed by the Commission, that: (1) is not owned or operated by or affiliated with a television network that, as of January 1, 1995, offered interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states; (2) on May 1, 1991, was retransmitted by a satellite carrier and was not a network station at that time; and (3) was, as of July 1, 1998, retransmitted by a satellite carrier under the statutory license of section 119 of title 17, United States Code. 47 U.S.C. § 339(d)(2). The television broadcast stations that meet the foregoing three criteria are limited to KTLA-TV (Los Angeles), WPIX-TV (New York), KWGN-TV (Denver), WSBK-TV (Boston), WWOR-TV (New York) and WGN-TV (Chicago). *See Satellite Exclusivity Order,* 15 FCC Rcd at 21692-93 ¶¶ 9-10. "Nationally distributed superstations" are a subset of "superstations." *See* 47 C.F.R. §§ 76.122 and 76.123.

[69] 47 C.F.R. § 76.122 sets out the network non-duplication rules as they apply to DBS providers.

[70] For a definition of "zone of protection," see 47 C.F.R. § 76.120(e).

[71] 47 C.F.R. § 76.122(a).

[72] *Id.*; *see also Satellite Exclusivity Order*, 15 FCC Rcd at 21703 ¶ 28. While there is no readily applicable measure that will precisely match specified zones in either the cable or satellite context, it would be more difficult to determine which satellite subscribers are located within a cable community unit, which is tied to the cable franchise process, than to use zip codes. *Id.*

[73] 47 C.F.R. § 76.122(b). *See also* 47 C.F.R. § 76.124, which details the requirements for invoking network non-duplication rights.

[74] 47 C.F.R. § 76.122(k)(l).

[75] 47 C.F.R. §§ 76.101-110, 76.120 and 76.123-125. Translator stations are not entitled to syndicated exclusivity protection.

for in the exclusivity contract between the station and syndicator.[76] Unlike the network non-duplication rule, however, the zone of protection is the same for smaller markets as it is for the top-100 markets.[77] With only a few exceptions, a station that has obtained syndicated exclusivity rights in a program may request a cable operator to black out that program as broadcast by any other television station, and may request a satellite operator to provide such protection against any nationally distributed superstation. The cable or satellite system must comply if properly notified in accordance with the rules.[78]

24. *Cable.* The first syndicated exclusivity rule was promulgated by the Commission in 1972, adopted as a result of a "Consensus Agreement" that was negotiated among the cable, broadcast, and program production industries in order to facilitate the passage of copyright legislation.[79] Shortly after Congress established a compulsory license system in 1976, the Commission began an inquiry to review the "purpose, effect, and desirability of" the syndicated exclusivity rules.[80] In 1979, the Commission adopted the Report on Cable Television Syndicated Exclusivity Rules, which performed a cost-benefit analysis to determine whether retaining the syndicated exclusivity rules would be in the public interest.[81] The Commission found that eliminating the rules would have negligible effects on the size of local station audiences and consequently would not significantly harm any broadcaster.[82] The Commission concluded that, when weighed against the minimal negative impact on broadcasters and program supply, the increase in diversity and number of new cable systems that the rules' elimination would allow supported their repeal. Therefore, in 1980, the Commission repealed the syndicated exclusivity rules.[83]

25. In 1988, however, the Commission reversed its decision, finding that the reasoning that shaped the 1980 decision to repeal the syndicated exclusivity rules was flawed in two significant respects.[84] First, the Commission found that its prior inquiry had incorrectly examined the effects of repeal or retention on individual competitors rather than how the competitive process operates.[85] Second, the Commission found that it had failed to analyze the effects on the local television market of denying broadcasters the ability to enter into contracts with enforceable exclusive exhibition rights when they had

[76] *See* 47 C.F.R. §§ 76.101, 76.103, 76.123(b). The Commission's rules provide such protection within a station's 35-mile geographic zone, which extends from the reference point of the community of license of the television station. *See* 47 C.F.R. §§ 73.658(m), 76.53, and 76.101 Note.

[77] *See* 47 C.F.R. § 76.101 Note.

[78] *See* 47 C.F.R. §§ 76.101 and 76.123. For the notification requirements see 47 C.F.R. §§ 76.105 and 76.123(d). For cable, the syndicated exclusivity rules provide exceptions for any station whose signal is in the Grade B contour of the station asserting exclusivity, when the signal is significantly viewed, or if the cable system has fewer than 1,000 subscribers. 47 C.F.R. § 76.106. For satellite, the rules also provide exceptions regarding the carriage of programming of any nationally distributed superstation. 47 C.F.R. § 76.123 (k)-(m).

[79] *See Cable Television Report and Order,* 36 FCC 2d 143 ¶ 65 (1972).

[80] *Cable Television Syndicated Program Exclusivity Rules*, 61 FCC 2d 746 (1976).

[81] *Cable Television Syndicated Program Exclusivity Rules*, 71 FCC 2d 951 (1979).

[82] *Id.* at 966 ¶ 44.

[83] *See Cable Television Syndicated Program Exclusivity Rules, Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television*, 79 FCC 2d 663 (1980) ("*1980 Program Exclusivity Order*"); *see also id.*

[84] *1988 Program Exclusivity Order*, 3 FCC Rcd 5299, 5308-09 ¶¶ 49-55, *recon. denied in pertinent part, 1989 Program Exclusivity Order,* 4 FCC Rcd 2711 (1989).

[85] *Id.* at ¶¶ 23, 49-51.

to compete with cable operators, who could enter into such contracts.[86] The Commission therefore reinstated its syndicated exclusivity rules.

26. The Commission's current cable syndicated program exclusivity rule allows local commercial stations to protect their exclusive distribution rights for syndicated programming on local cable systems in a local market.[87] Distributors of syndicated programming are allowed to seek protection for one year from the initial licensing of such programming anywhere in the United States, except where the relevant programming has already been licensed.[88] The exceptions to application of the syndicated program exclusivity rule are similar to those that apply to the network non-duplication rule. Cable systems with fewer than 1,000 subscribers are exempt because of the cost of the equipment necessary to carry out deletions.[89] The rule also does not apply if the distant station's signal is "significantly viewed" in a relevant cable community.[90] In addition, the syndicated programming of a distant station need not be blacked out if that station's Grade B signal encompasses the relevant cable community.[91]

27. *Satellite*. SHVIA required the Commission to extend its cable exclusivity rules, including syndicated exclusivity, to DBS providers only with respect to retransmission of nationally distributed superstations.[92] The Commission implemented this using zip codes rather than community units to determine zones of protection.[93] The rules for satellite carriers also provide exceptions for significantly viewed stations and for areas in which the satellite carrier has fewer than 1,000 subscribers in a protected zone.[94]

3. Sports Blackout

28. The Commission's sports blackout rule protects a sports team's or sports league's distribution rights to a live sporting event taking place in a local market.[95] As with the network non-duplication and syndicated exclusivity rules, the rule applies only to the extent the rights holder has contractual rights to limit viewing of sports events. The sports blackout rules are applied only if a local station is not broadcasting the local sporting event. If a local station does not have permission to broadcast the local game, then no other broadcaster's signal displaying the game can be carried by a cable or satellite operator to subscribers in the protected local blackout zone.[96] The purpose of the sports blackout rule is

[86] *Id.* ¶¶ 23, 52-55. This analysis in 1988 pre-dates the requirements for retransmission consent.

[87] 47 C.F.R. § 76.101. A syndicated program is defined as "any program sold, licensed, distributed or offered to television station licensees in more than one market within the United States other than as network programming . . ." 47 C.F.R. § 76.5(ii).

[88] *See* 47 C.F.R. § 76.103.

[89] *See* 47 C.F.R. § 76.106(b). *See also 1988 Program Exclusivity Order*, 3 FCC Rcd at 5314 ¶ 15.

[90] 47 C.F.R. § 76.106(a).

[91] *Id.*

[92] *See* SHVIA § 1008, creating 17 U.S.C. § 339(b).

[93] *See Satellite Exclusivity Order*, 15 FCC Rcd at 21703 ¶ 28. *See also* explanation of community units at n. 63, *supra*.

[94] *See* 47 U.S.C. § 340(e); 47 C.F.R. § 76.123(m).

[95] 47 C.F.R. § 76.111.

[96] 47 C.F.R. § 76.128.

to ensure the continued general availability of sports programming to the public. The Commission adopted this rule, which pre-dates retransmission consent, based on a concern that sports teams would refuse to sell the rights to their local games to television stations serving distant markets due to their fear of losing gate receipts if the local cable system imported the local sporting event carried on a distant station.[97]

29. *Cable*. The Commission originally adopted the sports blackout rules in 1975.[98] The rules apply to any television broadcast station, not just network stations. The rules are triggered when a subject sporting event will not be aired live by any local television station carried on a cable system.[99] Under the cable sports blackout rule, the holder of the rights to the event (*e.g.*, a sports team or league, rather than a broadcaster) has the right to prohibit cable carriage inside the zone of protection of a live sporting event broadcast by a station outside the specified zone of protection when that event is played locally, but the team or league does not permit the local broadcast stations to televise the event. The zone of protection for the sports blackout rule is generally 35 miles surrounding the broadcast station's community of license in which the live sporting event is taking place.[100] The sports blackout rules do not apply to any community unit with fewer than 1,000 subscribers.[101]

30. *Satellite*. SHVIA directed the Commission to extend the sports blackout rules to satellite carriers.[102] The satellite sports blackout rule applies to retransmission of both nationally distributed superstations and network stations.[103] As in the cable context, the satellite sports blackout rule applies when a subject sporting event will not be aired live by any local television station, and a satellite carrier retransmits a nationally distributed superstation or a network station carrying that sporting event to a household within the zone of protection of the holder of exclusive distribution rights to the event.[104] In these cases, the television broadcast station or other rights holder may require the satellite carrier to black out these particular programs for the satellite subscriber households within the protected zone.[105]

31. As with the network non-duplication and syndicated exclusivity rules, the sports blackout

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[97] The Commission was concerned that sporting events would be available to fewer viewers as a result. *See Amendment of Part 76 of the Commission's Rules and Regulations Relative to Cable Television Systems and the Carriage of Sports Programs*, 54 FCC 2d 265, 281 ¶ 57 (1975).

[98] *Id.*

[99] 47 C.F.R. § 76.111.

[100] When sports facilities are located in suburban areas, the downtown reference points specified in section 76.53 may be inappropriate for purposes of calculating the protected zone (*e.g.*, the New England Patriots play midway between Boston and Providence). Therefore, the Commission has expressed its willingness to consider waivers "to substitute a zone of protection extending out 35 miles from the site of a sports event for the television station specified zone designated by the rule." *Amendment of Part 76 of the Commission's Rules and Regulations Relative to Cable Television Systems and the Carriage of Sports Programs on Cable Television Systems, Reconsideration of Report and Order in Docket. No. 19417* ("*1975 Sports Blackout Reconsideration Order*"), 56 FCC 2d 561, 567 ¶ 19 (1975).

[101] 47 C.F.R. § 76.111(f).

[102] *See* 47 U.S.C. § 339(b); *Satellite Exclusivity Order*, 15 FCC Rcd at 21719-23 ¶¶ 60-69.

[103] 47 U.S.C. § 339(b)(1).

[104] 47 C.F.R. § 76.128.

[105] 47 C.F.R. § 76.128(a)-(b).

rules are applied to satellite carriers by reference to zip codes rather than community units.[106] A satellite carrier is not required to black out a sports event to a subscriber who lives outside the specified zone but within an area defined in terms of an excluded zip code.[107] Also, a satellite carrier is not required to black out a sports event if the carrier has fewer than 1,000 subscribers within the specified zone.[108]

III. DISCUSSION

32. The rules examined in this report were adopted to ensure that broadcasters are compensated fairly for MVPDs' retransmission of their signals, that MVPD retransmission of distant signals does not undermine exclusivity protections negotiated by broadcasters and their programming suppliers, and that sports leagues' contractual arrangements for the exhibition of sporting events are preserved. All of these rules have been adapted over time in response to new technologies and changing market conditions, as well as to balance various public policy goals. Since 1992, technological advances, increased channel capacity, and the introduction of DBS as a competitor to cable have been accompanied by revisions in the rules to: (1) enhance the viability of over-the-air broadcasting; (2) promote localism; and (3) advance regulatory parity between cable and DBS, while taking account of their different operational structures.

33. It is essential to bear in mind that the four rules considered in this Report do not operate in a vacuum. They are part of a mosaic of other regulatory and statutory provisions (*e.g.*, territorial exclusivity, copyright compulsory licensing, and mandatory carriage) to implement key policy goals. For example, territorial exclusivity protects localism by preventing local broadcasters from contracting for exclusivity outside their local markets, while network non-duplication and syndicated exclusivity protect localism by facilitating enforcement of contractual arrangements that limit importation of duplicative distant broadcast signals into local markets.[109] Thus, these rules complement one another. Similarly, copyright law and retransmission consent rules operate in a complementary fashion. The statutory compulsory license compensates rights holders for use of their property, while permitting MVPDs to retransmit their programming without costly and time-consuming negotiations with individual copyright holders. Further, the government-established copyright fee for distant signals, which is higher than that for local stations, operates together with the network non-duplication and syndicated exclusivity rules to encourage MVPD carriage of local broadcast signals.[110] Finally, broadcast mandatory carriage rights, which promote localism and ensure the viability of free, over-the-air television, complement the retransmission consent regime. Together, must-carry and retransmission consent provide that all local stations are assured of carriage even if their audience is small, while also allowing more popular stations to seek compensation (cash or in-kind) for the audience their programming will attract for the cable or satellite operator. Must-carry alone would fail to provide stations with the opportunity to be compensated for their popular programming. Retransmission consent alone would not preserve local stations that have a smaller audience yet still offer free over-the-air programming and serve the public in their local areas.[111] Because of the interplay among these various laws and rules, when any piece of the legal landscape governing carriage of television broadcast signals is changed, other aspects of that landscape also require careful examination.

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[106] 47 C.F.R. § 76.127(b)(4).

[107] 47 C.F.R. § 76.127(d).

[108] 47 C.F.R. § 76.127(e). *See Satellite Exclusivity Order*, 15 FCC Rcd at 21724-25 ¶¶ 70-72.

[109] 47 C.F.R. §§ 73.658 (b) and (m), 76.92, and 76.101.

[110] Satellite carriers are not required to pay any royalty fees for local-into-local carriage. 17 U.S.C. § 122.

[111] *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*).

34. Cable commenters in particular advocate substantial modification of the regulations governing retransmission consent, as well as significant reduction or even elimination of network non-duplication, syndicated exclusivity, and sports blackout rules. For the most part, these commenters' objections to the current rules focus on how they impact the relative market power of broadcasters and cable operators – *i.e.*, which party has the upper hand when negotiating retransmission consent, the prices (monetary and in-kind) MVPDs pay for retransmission consent, the use of retransmission consent to facilitate carriage of affiliated non-broadcast networks, and the prices consumers pay for popular tiers of MVPD programming. Although we have examined the arguments and proposals advanced in the record, we do not believe comments directed at the foregoing concerns can be properly considered within the scope of our examination. Underlying these comments, however, is an implication that the current rules impede cable operators' ability to compete with DBS, which cable commenters appear to view as subject to more lenient requirements. Consistent with the scope of our mandate, we focus on these concerns in detail. For the reasons set forth herein, we do not recommend specific statutory revisions or propose to revise related Commission regulations at this time.

A. Retransmission Consent

35. Of the four rules examined in this report, retransmission consent is the most recent right granted. Prior to 1992, when the policy goal was to ensure the continued viability of local broadcasters and thereby to enable more households to receive local broadcast programming through cable carriage, broadcasters did not have the right to negotiate retransmission consent. In 1992, however, Congress enacted a statutory provision to address broadcasters' longstanding claim for fair compensation for retransmission of their signals by MVPDs.[112] Retransmission consent replaced the pre-1992 free use of the broadcaster's signal with the post-1992 scheme in which signals may be retransmitted pursuant to the broadcaster's consent in exchange for negotiated compensation. Although retransmission consent does not guarantee that a broadcaster will receive fair compensation from an MVPD for retransmission of its broadcast signal, it does provide a broadcaster with the opportunity to negotiate for compensation. Notably, Congress chose not to "dictate the outcome of the ensuing marketplace negotiations."[113] Many expected that cable operators would compensate broadcasters with cash in return for retransmission consent. In reality, much of the compensation for retransmission consent has been in-kind, including carriage of an affiliated non-broadcast channel, or other consideration such as the purchase of advertising time, cross-promotions, and carriage of local news channels. While many of the comments in this proceeding focus on retransmission consent agreements that involve carriage of affiliated non-broadcast networks as a form of compensation for carriage of network owned and operated stations, little or no information has been provided regarding other types of retransmission consent agreements. As we discuss below, our review of the record does not lead us to recommend any changes to the retransmission consent regime at this time.

1. Comments

36. Several commenters complain that broadcasters link retransmission consent for carriage of

[112] 47 U.S.C. § 325 (b). Lorna Veraldi, *Newscasts as Property: Will Retransmission Consent Stimulate Production of More Local Television News?*, 49 Fed. Comm. L. J. 469, 484-85 (1994). Prior to the 1992 enactment of retransmission consent, broadcasters were not entitled to direct compensation for MVPD carriage of their signals, although under the 1976 copyright statute, cable operators were required to pay copyright fees for carriage of broadcast stations.

[113] NAB Comments at 18 (citing the *Senate Report* at 36).

their broadcast stations to carriage of affiliated non-broadcast networks or other content.[114] MVPDs claim that this results in a variety of harms and consequences unintended by Congress.[115] MVPDs claim that conditioning retransmission consent on the carriage of non-broadcast networks increases the size and the price of the extended basic tier and occupies capacity that could be used to carry DTV signals and independent networks.[116] Joint Cable Commenters argue that retransmission consent has become the principal driver of cable rate increases, an unanticipated consequence.[117] Joint Cable Commenters further argue that another unintended result of the retransmission consent regime is that broadcast networks have become the dominant providers of video programming.[118]

37. Several commenters express concerns about broadcasters' ability to exercise market power to fill up MVPD channel capacity with their affiliated programming.[119] Commenters state that the Commission itself has recognized that the signals of local broadcast television stations are without close substitutes and has previously held that News Corp.'s Fox network stations possess market power in the broadcast station segment of the video programming market.[120] Joint Cable Commenters contend that a broadcaster's threat to withhold its signal during retransmission negotiations represents an exercise of market power, even if the broadcaster itself is not affiliated with any non-broadcast networks, because an MVPD cannot afford to risk subscriber defections to alternative MVPDs.[121] Broadcasters are further strengthened in retransmission consent negotiations, according to Joint Cable Commenters, by the network non-duplication rule and the syndicated exclusivity rule, which prevent MVPDs from obtaining a

[114] *See, e.g.,* Joint Cable Commenters Comments at 6; ACA Comments at 7; EchoStar Comments at 3-6; Time Warner Reply Comments at 4. According to EchoStar, broadcasters condition retransmission consent on carriage of affiliated non-broadcast networks, carriage of affiliated broadcast stations in the same market, and carriage of affiliated broadcast stations in other markets. EchoStar Comments at 3-8.

[115] Time Warner asserts that Congress expected that most broadcast stations would elect must carry, rather than retransmission consent, whereas the opposite has happened. According to Time Warner, in the latest round of retransmission consent negotiations, virtually all broadcast stations owned by or affiliated with the top six broadcast networks elected retransmission consent, rather than must-carry. *See* Time Warner Reply Comments at 3. The six networks are ABC, CBS, FOX, NBC, UPN and WB.

[116] Joint Cable Commenters Comments at 3-4; ACA Comments at 7; Discovery Reply Comments at 2-3.

[117] Joint Cable Commenters Comments at 40-41; 46-50; *see also* William P. Rogerson, *The Social Cost of Retransmission Consent Regulations* (Feb. 28, 2005) at 17-19 (the Rogerson study is attached to Joint Cable Commenters Comments).

[118] Joint Cable Commenters Comments at 18-26. Joint Cable Commenters note that the parent companies of the Big Four broadcast networks now own ten of the fifteen top-rated non-broadcast networks. *Id.* at 19. They further state that before broadcasters gained retransmission consent rights, only Fox was vertically integrated with a studio. Today, all of the Big Four broadcast networks are vertically integrated with studios. *Id.* at 24.

[119] Joint Cable Commenters at 11-13 (because they control "must have" programming, the Big Four broadcast networks (*i.e.*, ABC, CBS, Fox, and NBC) are able to obtain carriage of affiliated networks at higher rates and on more favorable terms than would be the case if those affiliated networks had to compete solely on their own merits); Discovery Reply Comments at 2-3 (broadcasters use of market power to fill up MVPD channel capacity with broadcast-affiliated programming makes it more difficult for programmers unaffiliated with broadcasters to obtain carriage of their programming in some markets (*e.g.*, Manhattan, where 60% of expanded basic tier is filled with broadcast affiliated programming)).

[120] Joint Cable Commenters Comments at 13; EchoStar Comments at 3 (citing *News-Hughes Order*, 19 FCC Rcd at 564 ¶ 202).

[121] Joint Cable Commenters Comments at 18-19.

substitute for the local broadcast station.[122]

38. EchoStar states that the exchange of retransmission consent for carriage of affiliated non-broadcast networks constitutes a *per se* illegal tie under the antitrust laws because local broadcast stations carrying network programming are critical to MVPD offerings and stations are using their bargaining power to insist on conditions that are anti-competitive.[123] Time Warner states that any compensation paid to broadcasters for retransmission consent, whether cash or carriage of affiliated programming, is greater than can be justified by the policies underlying retransmission consent.[124] As a practical matter, cable systems that have not increased their capacity to keep pace with competitors may have the most difficulty accommodating requests for the carriage of additional networks in exchange for consent to retransmit broadcast signals. In particular, small cable operators with limited channel capacity contend that such conditioning harms their ability to compete against DBS operators with much larger channel capacity.[125] Joint Cable Commenters and Time Warner state that retransmission consent was not expected to have these various negative effects, but instead was intended to strengthen the ability of local broadcasters to compete against MVPDs.[126]

39. MVPDs propose several potential remedies to the problems they discuss in their comments. EchoStar requests that the Commission abolish any presumption that retransmission consent arrangements that link carriage of broadcast station signals to carriage of affiliated content are consistent with competitive marketplace considerations.[127] EchoStar also asks that third parties be prohibited from negotiating retransmission consent agreements.[128] The Joint Cable Commenters propose that before a broadcaster can initiate a service disruption by withholding retransmission consent, it must make an offer that is not linked to the carriage of national or regional networks.[129] Several commenters recommend that the Commission require television stations and MVPDs to undertake mandatory arbitration, similar to that imposed in the *News-Hughes Order*, before a station is permitted to withdraw or withhold retransmission consent for its local signal, and to meet other conditions imposed in the *News-Hughes Order*.[130]

[122] *Id.* at 14.

[123] EchoStar Comments at 3-6.

[124] Time Warner Reply Comments at 7.

[125] ACA Comments at 7.

[126] Joint Cable Commenters Comments at 28-33; Time Warner Reply Comments at 4.

[127] EchoStar Comments at 6-7. The purpose of its proposal is to prevent broadcast networks from negotiating on behalf of their affiliates. *Id.*

[128] ACA proposes a similar prohibition in a separately-filed Petition for Rulemaking. *See* ACA, *Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103, Retransmission Consent, Cable Network Non-Duplication, and Syndicated Exclusivity* (Mar. 2, 2005) ("*ACA Petition for Rulemaking*").

[129] This would permit the linkage of carriage of a broadcast station's analog signal to carriage of the broadcaster's digital or multicast signals, thereby making the considerations locally-based and broadcast-related, consistent with the goals of the 1992 Act to foster localism and local broadcasting. Joint Cable Commenters meeting with Media Bureau staff (Jul. 25, 2005).

[130] *See, e.g.,* BellSouth Comments at 8; EchoStar Comments at 10-11; ACA Comments at 11. *See also News-Hughes Order*, 19 FCC Rcd at 572-76 ¶¶ 218-26. Under the current rules, when a retransmission consent agreement expires, a broadcaster may withhold its signal from an MVPD while negotiating a new retransmission consent agreement (except during ratings "sweeps" periods). 47 C.F.R. § 76.1601, Note 1. Although this does not occur often, broadcasters have withheld their signals during retransmission consent disputes in a few instances (e.g., Nexstar withheld signals from several cable systems in Missouri and Texas in 2005).

BellSouth urges the Commission to prohibit a television broadcast station from requiring the carriage of its digital signal as a condition for retransmission consent for the carriage of its analog signal.[131] BellSouth also requests that the Commission include program access non-discrimination principles in the retransmission consent rules in order to help MVPDs with small subscriber bases obtain broadcast signals at lower prices.[132] EchoStar urges that the statutory ban on exclusive retransmission consent agreements (which expires on January 1, 2010) be made permanent in order to ensure that all MVPDs have access to all local broadcast signals.[133]

40. Broadcasters, on the other hand, argue that Congress believed that the pre-1992 regulatory scheme was unfair to broadcasters and enacted retransmission consent to provide broadcasters with the right to control the retransmission of their signals. Broadcasters believe Congress intended to establish a marketplace for the exchange (*i.e.*, retransmission) of broadcast signals, without dictating the outcome of the retransmission consent negotiations.[134] They point out that Congress understood and approved of monetary compensation, carriage of affiliated non-broadcast networks, and other in-kind compensation as possible terms of retransmission consent.[135] Broadcasters say the practice of conditioning broadcast station carriage on the carriage of non-broadcast networks developed after cable operators declined to pay cash for retransmission consent.[136] Network Affiliates state that conditional carriage proposals are legal and are expected to become a common tool used by broadcasters for obtaining MVPD carriage of their digital signals.[137] According to Network Affiliates, nothing would be more detrimental to the digital transition than for broadcasters to be denied dual must carry and then prohibited from negotiating for carriage of both signals under retransmission consent.[138]

41. Broadcasters deny that retransmission consent is responsible for the increasing cable rates

[131] BellSouth suggests that the Commission prohibit a television broadcast station from imposing any non-optional linkage of its digital signal to carriage of its analog signal in exchange for retransmission consent. It argues that the Commission has determined that television stations are not entitled to mandatory carriage of their digital signals or their digital multicast channels during the DTV transition, and that broadcasters should not be able to circumvent that decision by forcing an MVPD into digital carriage as a *quid pro quo* for analog carriage. BellSouth Comments at 8. For the same reasons discussed herein regarding the linkage of broadcast and non-broadcast signals, we will not recommend any restrictions on the terms of retransmission consent agreements at this time.

[132] BellSouth Comments at 8. BellSouth also proposes that Congress amend the program access statutory provision (47 U.S.C. § 548) so that its prohibition on exclusive contracts remains in effect at least until the current sunset date for the statutory ban on exclusive retransmission consent agreements. BellSouth Comments at 8. An examination of the program access provisions is beyond the scope of this proceeding, and we decline to consider this proposal.

[133] EchoStar Comments at 12-13.

[134] NAB Comments at 14; Network Affiliates Comments at 4.

[135] NAB Comments at 18-20; Network Affiliates Comments at 4-5 (citing *Senate Report* at 35-36). Other examples of in-kind compensation include: an agreement by a cable operator to: (1) purchase advertising on the broadcast station; (2) promote the broadcast station on cable program service channels; and (3) allow the broadcast station to sell local advertising time on cable program service channels. Network Affiliates Comments at 8.

[136] NAB Comments at 18-19; Network Affiliates Comments at 7-8; Disney Reply Comments at 7-8; Fox Reply Comments at 5.

[137] Network Affiliates Reply Comments at 30.

[138] *Id.*

paid by subscribers,[139] maintaining that non-programming costs, such as the investments associated with offering broadband services and digital television, are responsible for increasing cable rates.[140] Broadcasters cite a recent GAO report as evidence that broadcast-affiliated networks receive license fees similar to the fees received by non-broadcast networks that are not affiliated with broadcasters.[141] Broadcasters fear that prohibiting in-kind compensation arrangements would eliminate needed flexibility and may give rise to more frequent disputes leading to the withdrawal of broadcasters' signals during retransmission consent negotiations.[142]

42. Finally, broadcasters deny that they have market power, asserting that so-called "must-have" programming is nothing more than programming that is currently popular, and that such temporary popularity among certain viewers is similar to the preference of a subset of consumers for a specific favorite restaurant, neither of which constitutes market power.[143] Network Affiliates contend that the ability of local television stations to negotiate compensation from MVPDs does not imply market power in an economic sense.[144] Rather, according to Network Affiliates, many non-broadcast networks are good substitutes for network broadcast signals, and nothing prevents cable operators from developing additional popular programming.[145] Viacom asserts that the parent companies of the four major broadcast networks (Viacom, Disney, News Corp., and NBC-Universal) collectively own only 23 percent of the existing non-broadcast networks, making it unlikely that any one of these companies could exercise market power capable of producing anticompetitive effects.[146] NAB says that prior to the launch of DBS, broadcasters were at the mercy of cable operators, which had monopoly power as the only broadcast retransmission system available.[147] With the advent of competition in the MVPD market, NAB states that broadcasters are now beginning to obtain compensation that more accurately reflects the value of

[139] Disney Reply Comments at 9-11; NBC Reply Comments at 6-7; Network Affiliates Reply Comments at 23; Viacom Reply Comments at 9-11; Fox Reply Comments at 12-13; and NSBA Reply Comments at 5-8.

[140] Disney Reply Comments at 10; Viacom Reply Comments at 11.

[141] Network Affiliates Reply Comments at 23; Viacom Reply Comments at 10-11 (citing General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, Highlights of GAO-04-8, Telecommunications (Oct. 2003)); *see also* Government Accountability Office, *Subscriber Rates and Competition in the Cable Television Industry*, Highlights of GAO-04-262T, Telecommunications (Mar. 25, 2004).

[142] NAB Comments at 16-17 and Reply Comments at 12; Disney Reply Comments at 6; Viacom Reply Comments at 4.

[143] NBC Reply Comments at 5. *See also* Network Affiliates Reply Comments at 12 (neither communications law nor economic theory recognize any such thing as must-have broadcast signals).

[144] Network Affiliates Reply Comments at 13. In support of its position, Network Affiliates cites statements made by the Media Bureau in a past report: "All differentiated products, such as video programming, possess some degree of market power in the sense that there are no perfect substitutes. The critical question in any analysis involving differentiated products is whether the existing degree of market power is sufficient to allow the firm to profitably engage in the hypothesized anticompetitive activity." *Id.* (citing *Report on the Packaging and Sale of Video Programming Services to the Public (A La Carte Report)* (MB Nov. 18, 2004).

[145] Network Affiliates Reply Comments at 13-14.

[146] Viacom Reply Comments at 13. *See also* Disney Reply Comments at 14-15; Jeffrey A. Eisenach and Douglas A. Trueheart, CapAnalysis, *Retransmission Consent and Cable Television Prices* (Mar. 31, 2005) at 15-27 (Exhibit A of the Disney Reply Comments); and Fox Reply Comments at 6.

[147] NAB Reply Comments at 31.

broadcast signals to MVPDs.[148]

43. Broadcasters oppose the various MVPD proposals to modify the existing retransmission consent regime. They unanimously oppose the imposition of mandatory arbitration requirements, asserting that the circumstances presented by the News Corp./DirecTV transaction were unique, and that imposition of such conditions on all broadcasters would be unjustified.[149] Broadcasters state that the Commission's program access rules are designed to address potential competitive harms arising from vertical integration of programmers and cable operators, and that BellSouth has not explained why the rules should apply to broadcasters that are not vertically integrated with cable operators.[150] Broadcasters further assert that the good faith negotiation requirement in the retransmission consent rules permits BellSouth to seek relief where it can show that broadcasters seek to impose discriminatory retransmission consent terms and conditions,[151] and that BellSouth fails to cite a single example of such discrimination.[152] Viacom states that broadcasters have strong incentives to have their signals carried to as many households as possible and do not have incentives to offer anticompetitive carriage terms to small or alternative MVPDs.[153] Broadcasters also oppose extension of the ban on retransmission consent agreements.[154]

2. Discussion

44. We believe that, overall, the regulatory policies established by Congress when it enacted retransmission consent have resulted in broadcasters in fact being compensated for the retransmission of their stations by MVPDs, and MVPDs obtaining the right to carry broadcast signals. As we previously have stated, the retransmission consent process provides "incentives for both parties to come to mutually beneficial arrangements."[155] The Commission has observed that both the broadcaster and MVPD benefit when carriage is arranged – the station benefits from carriage because its programming and advertising will be carried as part of the MVPD's service, and the MVPD benefits because the station's programming

[148] *Id.* at 31.

[149] Disney Reply Comments at 13-16; NBC Reply Comments at 5-6; NAB Reply Comments at 20-22; Viacom Reply Comments at 14-15; Network Affiliates Reply Comments at 4-9. Broadcasters argue that there have been thousands of retransmission consent negotiations since 1992, but fewer than 10 complaints have been filed against broadcasters alleging a failure to negotiate in good faith. NAB Comments at 20-21; Network Affiliates Reply Comments at 32. According to broadcasters, there has only been one case where the Commission reached the merits of the complaint, and in that case the Commission determined that the broadcaster had fulfilled its obligation. *Id.*

[150] NAB Reply Comments at 22-23.

[151] NAB Reply Comments at 23.

[152] Network Affiliates Reply Comments at 29.

[153] Viacom Reply Comments at 15.

[154] NAB argues that the ban was intended to be a transitional measure to help foster the growth of DBS as a competitor to incumbent cable operators. NAB Reply Comments at 26-27. NAB states that in the early years of DBS, Congress was concerned that cable operators would coerce broadcasters into entering exclusive contracts, and it placed a ban on such contracts as a temporary solution to facilitate the growth of DBS and competition between cable and DBS. *Id.* at 27.

[155] *News-Hughes Order*, 19 FCC Rcd at 556-57 ¶ 180, ns. 502-06 (citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723, 6747 ¶ 115 (1994); *SHVIA Good Faith Order*, 15 FCC Rcd at 5448 ¶ 8; and Applicants' Reply at 44-45).

makes the MVPD's offerings more appealing to consumers. Most importantly, consumers benefit by having access to such programming via an MVPD. Thus, as a general rule, the local television broadcaster and the MVPD negotiate in the context of a level playing field in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially is detrimental to each side.[156]

45. Nevertheless, we note cable operators' widespread concern that retransmission consent negotiations frequently involve broadcasters tying carriage of their broadcast signals to carriage of numerous affiliated non-broadcast programming networks. This process may produce results that go beyond what Congress envisioned. We note, though, that if Congress views the carriage of several of a broadcaster's non-broadcast programming networks as an unintended consequence of retransmission consent and seeks to address this practice, it is important that Congress also consider changes to other aspects of the broadcast signal carriage framework, specifically the mandatory carriage provisions. As we noted above, the retransmission consent rules are part of a carefully balanced combination of laws and regulations governing carriage of television broadcast signals, with the must-carry and retransmission consent regimes complementing one another. For example, since the Commission's decision to deny broadcasters the ability to assert dual and multicast must-carry, broadcasters have begun using their retransmission consent negotiations to negotiate carriage of their digital signals, thus furthering the digital transition by increasing the number of households with access to digital signals. If broadcasters are limited in their ability to accept in-kind compensation, they should be granted full carriage rights for their digital broadcast signals, including all free over-the-air digital multicast streams. Should Congress consider proposals circumscribing retransmission consent compensation, we encourage review of such related rules and policies, as well, in order to maintain a proper balance.

B. Exclusivity Rules

1. Network Non-Duplication and Syndicated Exclusivity Rules

a. Comments

46. Cable operators propose that the network non-duplication and syndicated exclusivity rules be made unenforceable with respect to stations that elect retransmission consent. Specifically, NCTA asks the Commission to initiate a rulemaking to exempt cable operators from compliance with these rules with respect to local broadcast stations that elect retransmission consent when the cable operator and broadcaster are unable to reach agreement and the cable operator seeks to carry a duplicating distant signal in lieu of the local broadcast signal.[157] NCTA and ACA argue that local stations can use their exclusivity rights to prevent cable operators from providing their subscribers with network programming

[156] *Id.*

[157] NCTA Comments at 12. In its separately-filed petition for rulemaking, ACA asks the Commission to revise the retransmission consent, network non-duplication, and syndicated exclusivity rules so that when a broadcaster seeks compensation for retransmission consent, a "small cable company" would be able to shop for lower cost network programming without being subject to network non-duplication and syndicated exclusivity. *ACA Petition for Rulemaking.* ACA proposes that broadcast stations and programming suppliers be prohibited from entering into contractual arrangements that would prevent the importation of duplicating distant signals into a local market in cases where the local station elects retransmission consent and seeks any terms "beyond carriage and channel placement." *Id.* at vii, 37. The term "small cable company" is defined in the Commission's rules governing rate regulation as "a cable television operator that serves a total of 400,000 or fewer subscribers over one or more cable systems." 47 C.F.R. § 76.901(e).

from distant affiliates.[158] ACA claims that broadcasters use the exclusivity rules to raise the price of retransmission consent because, without the ability to carry distant signals, cable operators do not have an alternative source of network programming.[159] ACA argues that this problem is exacerbated in smaller and rural markets that are underserved by over-the-air broadcasters.[160]

47. Broadcasters maintain that the network non-duplication and syndicated exclusivity rules are needed to protect programming for which broadcasters have exclusive rights. They state that elimination of the rules would harm localism, jeopardize broadcast networks, and undermine retransmission consent.[161] According to broadcasters, the rules promote the long-standing goal of localism by: (1) providing MVPD subscribers with access to local content produced by broadcasters; and (2) maximizing local viewership and advertising revenues to support the development and airing of local content.[162] They claim that the rules are necessary to permit broadcasters that have negotiated exclusivity rights with their programming suppliers to protect those rights against MVPD importation of duplicating distant signals and assert that the rules are intended to provide broadcasters with an incentive to invest in programming that serves their communities.[163] To support their arguments, broadcasters note that in 1988, the Commission concluded that the exclusivity rules are necessary to preserve broadcasters' ability to compete against cable operators. They further point out that the Commission later rejected proposals to eliminate these rules when retransmission consent was implemented in 1993.[164] NAB argues that the consequences of eliminating exclusivity protection would be especially dire in small and medium sized markets because the rules are needed to protect the audience base of stations in such markets.[165]

48. Broadcasters fear that elimination of the rules with respect to stations that elect retransmission consent would endanger localism by subjecting local broadcasters to competition with out-of-market broadcasters. NAB indicates that many network affiliation agreements refer to the Commission's rules to define the parties' obligations with respect to exclusivity and to define the geographic scope of exclusivity.[166] Thus, NAB argues that exempting some cable operators from application of the rules with respect to stations that elect retransmission consent could cause significant

[158] NCTA Comments at 12; ACA Comments at 4.

[159] ACA Comments at 4. In its Petition for Rulemaking, ACA specifically proposes that the Commission adopt a new subsection (n) to 47 C.F.R. § 76.64, allowing a "small cable company" to override a local station's exclusivity rights when retransmission consent negotiations fail and the cable operator is able to obtain retransmission consent rights for carriage of an out-of-market station. ACA Petition for Rulemaking at 37.

[160] ACA Comments at 5. In more populous regions, by contrast, viewers may be served by out-of-market significantly viewed signals, which are treated as local for copyright purposes and which cable operators may retransmit without having to black out duplicative programming.

[161] Disney Reply Comments at 17-21; Duhamel Reply Comments at 2; NAB Reply Comments at 35-37; Network Affiliates Reply Comments at 40-45; NSBA Reply Comments at 9-10.

[162] Disney Reply Comments at 18-19. See also NBC Reply Comments at 10 (NCTA's proposal treats distant broadcast network signals as equivalent to local broadcast network signals, but the Commission has always recognized the difference); NAB Comments at 10-11 (unlike local stations, distant stations do not provide viewers with local news, weather, emergency, and public service programming).

[163] NSBA Reply Comments at 9; Viacom Reply Comments at 16-17.

[164] NAB Reply Comments at 35-36; Disney Reply Comments at 17-18.

[165] NAB Reply Comments at 35-36.

[166] NAB meeting with Media Bureau staff (Aug. 10, 2005). *See also* NBC Comments at 6-7.

disruption of existing contractual relationships by forcing broadcasters and their programming suppliers to renegotiate existing contracts.[167] NAB further contends that adoption of the proposed regulatory modifications may well lead to unintended consequences that cannot be anticipated on the basis of the existing record.[168]

b. Discussion

49. Whether or not these rules remain in place, cable operators' ability to retransmit duplicative distant broadcast signals is governed in the first instance by the contract rights negotiated between broadcasters and their programming suppliers. If networks and syndicators have entered into contracts with broadcasters that limit broadcasters' exclusivity such that a duplicative distant signal could be imported by an MVPD without blacking out the duplicative programming, the Commission's rules would not prevent that result. Conversely, where exclusivity contracts exist, repeal of the Commission's rules would not necessarily be sufficient to enable the retransmission of duplicative programming. Moreover, to some extent, rural cable operators are already able to import distant signals without blacking out duplicative programming. The exclusivity rules already contain certain exceptions that should ameliorate rural cable operators' need for relief. Significantly viewed signals, for example, are not subject to these rules.[169] The rules also do not apply to small cable systems serving fewer than 1,000 subscribers. According to ACA, approximately half of its members qualify for this exemption.[170]

50. To the extent that cable operators are asking the Commission to modify the network non-duplication and syndicated exclusivity rules such that they would supersede contract arrangements between broadcasters and their programming suppliers that are permitted by the rules, we cannot endorse or recommend such modifications. The legislative history of the 1992 Act indicates that the network non-duplication and syndicated exclusivity rules were viewed as integral to achieving congressional objectives.[171] Based on this legislative history, the Commission previously has refused to find that the network non-duplication rules do not apply to stations that elect to exercise retransmission consent rights with respect to a cable system.[172] Moreover, the Commission has a longstanding policy favoring the

[167] *Id.*

[168] *Id.*

[169] *See* 47 C.F.R. §§ 76.92(f) and 76.106.

[170] ACA Comments at 4.

[171] The *Senate Report* states that "the Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to be submitted on cable systems for carriage or local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in S. 12." *Senate Report* at 38.

[172] *Signal Carriage Order*, 8 FCC Rcd at 3006 ¶ 180 ("It seems clear that Congress intended that local stations electing retransmission consent should be able to invoke network non-duplication protection and syndicated exclusivity rights, whether or not these stations are actually carried by a cable system."); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* 8 FCC Rcd 2965 (1993), *on recon.,* 9 FCC Rcd 6723 at 6747 ¶ 114 ("*Reconsideration Decision*") ("Network non-duplication and syndicated exclusivity rights protect the exclusivity that broadcasters have acquired from their program suppliers, including their network partners, while retransmission consent allows broadcasters to control the redistribution of their signals. Both policies promote the continued availability of the over-the-air television system, a substantial government interest in Congress' view.")

provision of local broadcast service to communities, and the Commission expects and indeed requires broadcasters to serve the needs and interests of their local communities. Except in cases where a contract violates the Commission's rules, we do not deem it in the public interest to interfere with contractual arrangements that broadcasters have entered into for the very purpose of securing programming content that meets the needs and interests of their communities. Such interference would contradict our own requirements of broadcast licensees and would hinder our policy goals.

51. Accordingly, we decline to recommend at this time that the network non-duplication and syndicated exclusivity rules be modified as proposed by NCTA. Rather than risking the major disruption and possible unintended consequences of rendering these rules unenforceable with respect to broadcasters that elect retransmission consent, it may be appropriate to consider whether 1,000 subscribers remains the correct benchmark for defining a small system, but there is no record in this proceeding to make that determination. Any such consideration should be undertaken cautiously in view of the important role these rules play in enabling local broadcasters to provide robust local service.

52. *Geographic Zone of Exclusivity Protection.* We do not recommend that the applicable zones of protection for the network non-duplication and syndicated exclusivity rules be modified and made consistent with the DMAs used to determine local television markets for must carry and retransmission consent election rights for both cable and DBS.[173] The geographic zones over which a broadcaster can request network non-duplication or syndicated exclusivity protection were originally adopted when determination of which broadcast stations were entitled to mandatory carriage rights on particular cable systems was based primarily on mileage zones. In applying network non-duplication and syndicated exclusivity protection to DBS, the Commission adopted the same exclusivity zones that were applicable to cable service consistent with Congress' directive in SHVIA.[174] In 1992, when Congress enacted must-carry/retransmission consent for cable operators, it established the ADI, which was replaced by the DMA, as the local market for carriage rights.[175] Similarly, when SHVIA was enacted, the local market for broadcast signal carriage was defined as the DMA.[176]

53. Some broadcast stations provide a good quality signal to all households and cable operators throughout the entire DMA. However, some broadcasters may not provide a strong signal to all households and cable systems throughout the DMA. DMAs can extend for hundreds of miles, especially in the western states, and there may be multiple affiliates of an individual network in a DMA.[177] In fact, Pioneer states that some broadcasters do not provide a strong signal to all households and cable systems where they currently assert network non-duplication and syndicated exclusivity protection under the current specified zone (*i.e.*, generally the 35/55 limits).[178] For these stations, extending exclusivity

[173] Duhamel at 1. Duhamel supports maintaining the existing exclusivity provisions as well as an increase in the zone.

[174] 47 U.S.C. § 339(b)(1)(A).

[175] *See* n. 32, *supra.*

[176] 17 U.S.C. § 122(j)(2).

[177] Nielsen delineates television markets by assigning each U.S. county (except for certain counties in Alaska) to one market based on measured viewing patterns both off-air and by MVPD distribution. Each U.S. county generally is assigned to only one market based on the market whose stations receive the preponderance of audience in that county. However, in a few cases where a county is large and viewing patterns differ significantly between parts of the county, a portion of the county is assigned to one television market and another portion of the county is assigned to another market. Several counties in Alaska are not assigned to any DMA.

[178] Pioneer Comments at 5.

protection to an even larger geographic area, such as the entire DMA, would further the disparity between the actual footprint where the station provides a strong signal and the exclusivity protection. Such an approach would permit a broadcaster to assert exclusivity and block retransmission of duplicative programming on distant broadcast signals in areas where the broadcaster does not provide service. Moreover, in terms of actual location, a distant station may be closer to a viewer than the "local" station based on DMA definitions. Thus, the closer station would be disadvantaged, and this modification could impede that station's ability to provide local service.

2. Sports Blackout Rule

a. Comments

54. The Professional Sports Leagues favor retention of the current sports blackout rule.[179] The Professional Sports Leagues state that the sports blackout rule does not impose any significant burden on cable or satellite operators and does not affect the ability of rural cable operators to compete with DBS in the provision of digital broadcast television signals to consumers.[180]

55. The Professional Sports Leagues state that they routinely incorporate blackout provisions into their negotiated out-of-market rights agreements.[181] However, they are unable to do so for broadcast stations carried pursuant to the statutory licenses granted by sections 111 and 119 of the Copyright Act.[182] They explain that the statutory licenses enable cable operators and satellite carriers to retransmit sports from distant broadcast stations without obtaining the consent of the affected sports clubs.[183] Those provisions, however, require MVPDs to comply with the sports blackout rule.[184] Absent the sports blackout rule, the Professional Sports Leagues state that MVPDs would be able to exploit compulsory licensing to override a decision by the sports club not to televise a particular home game in the local market in which it is being played.[185] In addition, the Professional Sports Leagues contend that absent the sports blackout rule, MVPDs could override a decision to provide exclusive rights to a non-broadcast regional sports network to televise that game within the club's home market.[186]

56. The Professional Sports Leagues state that the sports blackout rule provides sports clubs narrow protection that requires MVPDs to black out only a handful of telecasts in approximately three dozen geographically-confined areas.[187] They say the protection afforded by the sports blackout rule is more limited than the protection the Professional Sports Leagues routinely negotiate regarding games not covered by the sports blackout rule.[188] For example, MVPDs may offer their subscribers a package,

[179] Professional Sports Leagues Comments at 8.

[180] *Id.* at 2-3.

[181] *Id.* at 8.

[182] *Id.*

[183] *Id.* at 4.

[184] *Id.*

[185] *Id.*

[186] Professional Sports Leagues Comments at 8.

[187] *Id.* at 5.

[188] *Id.*

called MLB Extra Innings, of up to 60 out-of-market telecasts of Major League Baseball ("MLB") games each week.[189] MVPDs, however, are contractually required to black out specific games on MLB Extra Innings throughout the home television territories of the teams participating in those games.[190] In contrast to the sports blackout rule, which permits blackouts only in a limited 35-mile zone around a Commission-determined "reference point" for the home club, the contractually negotiated blackout throughout the home territories of Professional Sports teams generally extends well beyond 35 miles.[191] In addition, the sports blackout rule affords blackout protection only to the home teams, while the Professional Sports Leagues often negotiate blackout protection for both the home and visiting teams.[192] Furthermore, the sports blackout rule permits clubs to provide exclusivity for specific games only to non-broadcast distributors – such as regional sports networks – and not to local broadcast stations.[193] Thus, when a local broadcast station shows a club's home game, the sports blackout rule does not apply and, therefore, does not permit the club to require MVPDs to black out the retransmission of a distant broadcast signal carrying the same game. In contrast, the Professional Sports Leagues typically negotiate blackout provisions that provide exclusive licensing arrangements with both broadcasters and MVPDs.[194] For example, MVPDs may not offer in either of the participating clubs' home territories any MLB Extra Innings game telecast involving those clubs, thus protecting those clubs' property rights (to broadcast or non-broadcast distribution) as the exclusive provider of their club's games.[195]

57. NCTA states that the Commission "should exempt a cable operator from facing blackouts under the network non-duplication, syndicated exclusivity, and sports blackout rules so that it can fully serve consumers with distant stations that it brings to its community," but NCTA does not address the sports blackout rule in any further detail.[196] NCTA also claims that DBS operators may import "multiple sporting events" in areas where DBS retransmission of distant signals is exempt from blackout.[197] The Professional Sports Leagues refute NCTA's claim that DBS may offer multiple sporting events to unserved households in areas that cable operators must black out pursuant to the sports blackout rule.[198]

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[189] *Id.* at 6.

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.* at 6.

[195] *Id.* at 6-7.

[196] NCTA Comments at 12.

[197] NCTA Comments at 5-6.

[198] Professional Sports Leagues Reply Comments at 2 (citing NCTA Comments at 5-6). We note that NCTA did not refer specifically to the blackout requirement of the sports blackout rule, and we interpret NCTA's statement as a reference to the disparities in the network non-duplication and syndicated exclusivity rules as they apply to cable and DBS. *See* NCTA Comments at 5-6. In a late-filed comment, Microcom claims that the sports blackout rule has been used by sports leagues to prevent DBS operators from importing to Alaska and Hawaii sports events being played hundreds of miles away and requests that the Commission restrict the application of the sports blackout rules to only those geographic areas with a reasonable opportunity to attend the sports event. Microcom Comments at 1-2. We note the sports blackout rule already applies only in a limited area (*i.e.*, 35-mile zone), and Microcom's complaint therefore would seem to relate to contractual restrictions, not to the Commission's sports blackout rule.

As the Professional Sports Leagues note, the sports blackout rule imposes the same blackout obligations on all MVPDs.[199] Thus, whenever a cable operator is required to black out a distant broadcast signal carrying a specific game under the sports blackout rule, the DBS operator serving subscribers in the same community must also black out that game.[200]

b. Discussion

58. Having examined the sports blackout rule and comments in the record, we conclude that the rule does not affect competition among MVPDs and we do not recommend any changes to the relevant statutes or regulations. Like the network non-duplication and syndicated exclusivity rules, the sports blackout rule is intended to ensure that MVPDs do not undermine contractual arrangements between broadcasters and sports programming rights holders by importing sports programming that is subject to blackout in the local market. Although NCTA broadly advocates elimination of all of the Commission's exclusivity rules, including the sports blackout rule, commenters have not advanced any link between the rule and competition among MVPDs, and no commenter presses the case for repeal or modification of the sports blackout rules.[201]

59. Sports leagues control both broadcast carriage and MVPD retransmission of their programming. A broadcaster cannot carry a sporting event on its local television stations without the permission of the sports leagues or clubs that own or hold the rights to the sports event. Under the current retransmission consent rules, MVPDs, with limited exceptions, cannot carry a broadcaster's signal without the permission of the broadcaster. Since the terms of carriage may include deletion of specific sports events, a sports league could prevent unwanted MVPD retransmission through contractual arrangements with broadcast stations. While the Professional Sports Leagues claim that the sports blackout rule gives them the additional ability to black out games being carried by MVPDs pursuant to the statutory licenses granted by sections 111 and 119 of the Copyright Act,[202] it appears that the same blackout protection can be obtained through their contracts with broadcast stations. Therefore, the sports blackout rule may serve primarily as an enforcement mechanism for existing contracts between broadcasters that purchase the distribution rights to the sports event and sports leagues or clubs that own the rights to the sports event.

60. Indeed, the sports leagues claim that they already negotiate contractual blackout protections that exceed the protections afforded by the Commission's rules, for example by extending the blackout zone to a team's entire home territory, as defined by the team or relevant sports league. Significantly, however, the Leagues do not request stronger rules. Moreover, any regulatory or statutory expansion of the blackout zone would require a careful consideration of the impact of such action on consumers. In the absence of any request that we consider such measures, or any evidence in the record concerning the relationship of the rule to competition among MVPDs, we are not recommending regulatory or statutory revisions to modify the protections afforded to the holders of sports programming rights.

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[199] *Id.*

[200] Professional Sports Leagues Reply Comments at 2. *See also* 47 C.F.R. § 76.127.

[201] *See* n. 198, *supra* (NCTA and Microcom complaints related to other rules or contractual obligations, not the sports blackout rule).

[202] 17 U.S.C. §§ 111, 119.

C. Parity Between the Cable and DBS Regulatory Structures

61. Some commenters have objected to certain disparities between the retransmission consent and program exclusivity rules as they apply to cable and DBS. Having recommended that major changes to the existing rules not be pursued for the reasons discussed above, we now turn to the question of whether disparities between the existing rules for cable and DBS should be eliminated. For reasons discussed further below, we conclude that although establishing parity in the laws and regulations governing DBS and cable carriage of television broadcast signals is a worthy goal, a comprehensive analysis of regulatory disparities and possible measures to achieve greater parity should await the results of the companion Copyright Office review of related copyright law which is being undertaken pursuant to SHVERA.

1. Comments

62. Cable commenters state that rural cable operators face increasing competitive pressure from satellite providers and ask the Commission to adopt or recommend various measures to remedy the perceived competitive imbalance. Specifically, NCTA explains that for unserved households DBS operators may import two distant broadcast signals affiliated with each broadcast network without retransmission consent, and without being subject to the network non-duplication and syndicated exclusivity rules.[203] In contrast, NCTA explains, for the same unserved households, cable operators must obtain retransmission consent to import distant broadcast signals, and these signals are subject to the network non-duplication and syndicated exclusivity rules.[204] NCTA proposes that cable operators, like DBS operators, should be exempt from obtaining retransmission consent when they provide distant broadcast signals to a household that would be allowed to receive the signal if it were a DBS subscriber.[205]

63. Broadcasters object to NCTA's proposal, saying it would harm local broadcasters' competitive position and ability to provide local programming.[206] Broadcasters argue that in enacting SHVIA, Congress stimulated competition between cable and DBS by providing DBS with a temporary reprieve from retransmission consent, network non-duplication, and syndicated exclusivity for households that do not receive broadcast service so that DBS could offer distant broadcast programming to subscribers.[207] Broadcasters assert, however, that Congress did not make the exemptions permanent; in SHVIA, Congress established a sunset date of December 31, 2004, for the exemptions, which was extended to December 31, 2009, in SHVERA.[208] NAB suggests that if cable and DBS have reached sufficient competitive equality in the MVPD marketplace to justify regulatory parity, the exemptions for DBS for unserved households should be eliminated.[209] The exemptions, NAB says, should not be

[203] NCTA Comments at 5. Additionally, NCTA argues that SHVERA gives DBS a new right to provide distant digital network signals to households that are served by analog networks signals but fail to receive an over-the air digital signal. NCTA Comments at 8-9.

[204] *Id.* at 4.

[205] *Id.* at 12.

[206] NAB Reply Comments at 25-26; Network Affiliates Reply Comments at 37-38.

[207] NAB Reply Comments at 25; Network Affiliates Reply Comments at 38.

[208] NAB Reply Comments at 25-26, Network Affiliates Reply Comments at 38.

[209] NAB Reply Comments at 26.

extended to cable.[210]

64. DBS operators also oppose NCTA's proposal. They state that NCTA's complaints and proposed regulatory changes fail to acknowledge the "no-distant-if-local" rule, which applies only to DBS providers.[211] SHVERA provides that a DBS operator cannot offer the analog signal of a distant network station to a new subscriber when the DBS operator carries the analog signal of a local broadcast station affiliated with the same network.[212] A similar prohibition applies to the importation of a distant digital network station when a digital local broadcast station affiliated with the same network is being carried.[213] EchoStar states this "super network non-duplication rule" applies only to DBS providers, for both served and unserved households, in every DMA where the DBS operator provides local-into-local service.[214] In contrast, EchoStar argues, a cable operator may carry distant analog and digital broadcast signals to all of its subscribers, whether or not they can receive an analog or digital over-the-air signal, subject to retransmission consent, network non-duplication, and syndicated exclusivity.[215] EchoStar contends that, although it is difficult to compare the competitive impact of the rules on cable and DBS operators, SHVERA's introduction of both the analog and digital "no-distant-if-local" rules place greater restrictions on DBS's carriage of distant network stations, relative to the restrictions placed on cable operators.[216]

2. Discussion

65. At the outset, parity – application of the same laws and regulations to cable and DBS – is a worthy goal. Several of Congress' revisions to the laws governing carriage of television broadcast signals by DBS operators have been aimed at establishing greater parity between the legal frameworks for cable and DBS operators.[217] Establishing statutory and regulatory parity between cable and DBS could mean applying the DBS provisions to cable, the cable provisions to DBS, or some combination of the two. The principal recommendation in the record is to extend to cable operators the exemptions from retransmission consent, network non-duplication, and syndicated exclusivity that apply to DBS operators for retransmission of distant broadcast network signals to "unserved households."[218]

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[210] *Id.*

[211] EchoStar Reply Comments at 4; DirecTV Reply Comments at 5.

[212] 47 U.S.C. § 339(a)(2)(C).

[213] 47 U.S.C. § 339(a)(2)(D)(iv).

[214] EchoStar Reply Comments at 4.

[215] *Id.* at 5.

[216] *Id.* at 6.

[217] House Commerce Committee Report at 1 (purpose of the SHVERA includes "increasing regulatory parity by extending to satellite carriers the same type of authority cable operators already have to carry 'significantly viewed' signals into a market"); *SHVIA Conference Report* at H11795 (SHVIA intended to place satellite carriers on more equal footing with local cable operators by allowing local-into-local carriage).

[218] NCTA Comments at 11-12. In addition to recommending that the retransmission consent and exclusivity rules be made parallel, NCTA also argues that satellite carriers receive a copyright advantage over cable operators in determining which stations are considered "network" stations subject to lower royalties. NCTA Comments at 10-11. Section 109 of SHVERA requires the Copyright Office to report to Congress on the operation of section 111, 119, and 122 copyright licenses. As the differing definitions of a "network" signal are an integral part of copyright law, we defer to the Copyright Office with respect to this issue.

66. We have examined the disparities in our rules as well as proposals advanced by cable operators to remedy the alleged ill effects of these disparities. We conclude that the proposed remedies would not necessarily have the desired effect and, in fact, may be unworkable. In addition, the role of copyright compulsory license authority cannot be ignored in this analysis, and disparities in the application of the copyright scheme to cable and DBS operators must be taken into account in any evaluation of proposed modifications to the Commission's retransmission and exclusivity rules or the underlying statutes. Those disparities are complex and cannot readily be categorized as favoring either one industry or the other.

67. Under current rules, there are significant differences between cable and satellite regarding the need to obtain retransmission consent for the carriage of broadcast stations outside the local DMA. The cable rules are straightforward with respect to carriage of distant signals. A cable operator generally may offer any distant broadcast signal to any household by paying the required copyright royalties, obtaining retransmission consent, and complying with the network non-duplication and syndicated exclusivity rules.

68. DBS operators, on the other hand, face greater restrictions in the retransmission of distant signals, especially for subscribers that are considered to be served by broadcast stations over-the-air. Specifically, a DBS operator may not offer distant network signals except to households shown to be "unserved" by network stations. On a going forward basis, a DBS operator will not be permitted to offer distant network signals to any subscriber where local-into-local service is available.

69. In some respects, however, the rules applicable to DBS are seemingly less restrictive than the rules applicable to cable. For example, a DBS operator may offer the signals of distant superstations (*i.e.*, non-network stations) to any household without obtaining retransmission consent. Cable operators, on the other hand, must obtain retransmission consent for all distant signals except a very limited group of superstations. DBS operators must comply with the network non-duplication and syndicated exclusivity rules only for nationally distributed superstations, a limited subset of all superstations. Cable operators must comply with these rules with respect to all distant signals. However, in practice, this supposed DBS advantage is not meaningful because the households treated as "unserved" are most likely outside of the 35/55 mile zone within which local stations may assert exclusivity protection against cable operators. In the cable context, where the concept of "unserved household" does not exist, cable operators are required to provide local stations as part of basic service to all subscribers and, while they are permitted to provide distant signals to anyone, they must obtain retransmission consent to do so and provide exclusivity protection where applicable.

70. One approach to remedying disparities would be to apply the DBS rules to cable households that would be considered "unserved." This would allow cable operators in outlying areas, which are often rural, to carry distant signals without retransmission consent and without having to blackout programming under the exclusivity rules. Since the concept of "unserved household" does not currently exist under the cable rules, as envisioned, the modification advocated by NCTA would provide that whenever a DBS operator may retransmit a distant broadcast signal to an unserved household without being subject to the retransmission consent, network non-duplication and syndicated exclusivity rules, a cable operator should be entitled to retransmit distant broadcast signals to the same household, if it were a cable household, without being subject to the retransmission consent, network non-duplication and syndicated exclusivity rules. NCTA claims this option would make it easier for cable operators to import distant broadcast signals to unserved households and into areas where it is difficult for viewers to get a good quality local broadcast signal.

71. It is unclear from the comments how cable systems would be able to determine whether

households are "unserved" and how they would differentiate in their delivery of programming between a household that is served and a household that is unserved. Given that all broadcast stations are supposed to be on a cable system's "basic" tier (in a rate-regulated system), it is unknown how the cable system would turn a distant station on or off from the basic tier based on whether a household is or is not "served." Satellite operators, on the other hand, are not required to offer local broadcast service in all DMAs, and there is no basic tier equivalent for DBS. Satellite providers also are subject to elaborate reporting requirements for notifying the networks as to which subscribers are getting particular distant network stations. Networks may (and do) challenge satellite carriers' designation of "unserved" status.

72. Moreover, it is unlikely that the network non-duplication and syndicated exclusivity rules now apply to cable service to a household that would be deemed "unserved," since such households tend to be distant from any broadcast station's community of license and therefore outside the applicable specified zones. Consequently, while cable operators generally are subject to the Commission's network non-duplication and syndicated exclusivity rules, it is unlikely that a broadcast signal delivered to an "unserved" home would be in an area where blacking out must occur, and parity with DBS in this case would not have a significant impact. Furthermore, out-of-market significantly viewed stations are not subject to the network non-duplication and syndicated exclusivity rules, and the rules do not apply to cable systems that serve fewer than 1,000 subscribers.

73. With respect to retransmission consent, if Congress amended the statute to exempt cable carriage of distant signals from retransmission consent to match the DBS model, cable operators would be relieved of retransmission consent obligations only with respect to individual subscribers, which is likely to be unworkable. In addition, pursuant to SHVERA, if local-into-local service is available in a market, a DBS operator may not offer distant signals to subscribers, even if they are "unserved," unless they were getting distant signals as of December 8, 2004. The analogous situation for cable would mean that distant signals would never be permitted because cable always carries local stations and is required to carry such signals on the basic tier, which is provided to all subscribers. As DBS operators expand local-into-local service, any perceived advantage that DBS has is likely to disappear over time as DBS carriage of distant signals shrinks to fewer and fewer markets and sunsets in 2009 (unless extended again).[219]

74. An alternative approach would be to apply the cable provisions to DBS. Under this alternative, as raised in the record, DBS operators would be required to obtain retransmission consent and would be subject to the network non-duplication and syndicated exclusivity rules in situations where DBS operators currently are not subject to those rules.[220] This option could be limited to the provision of distant signals to unserved households or it could be extended to the provision of distant signals to all DBS subscribers, if the compulsory copyright license were revised. With respect to the offering of distant broadcast signals to unserved households, this option, which is raised by NAB, would make it more

[219] NCTA suggests that DBS operators may have an additional advantage with respect to the delivery of distant digital networks to unserved households because some households that are served by analog signals may be unserved by digital signals. *See* para. 77, *infra*. While there may be some cases where a household that is not entitled to receive analog distant network signals may receive digital distant network signals, we expect that number will diminish over time as DBS operators increasingly provide local digital broadcast stations to their subscribers. *See* DirecTV, *DIRECTV Spaceway F2 Satellite Will Expand Local Digital/HD Services for DIRECTV Customer; Satellite Shipped to French Guiana* (press release) May 25, 2005, and *DIRECTV Spaceway F1 Satellite Launches New Era in High-Definition Programming; Next Generation Satellite Will Initiate Historic Expansion of DIRECTV Programming* (press release) Apr. 26, 2005, available at http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-news (visited Aug. 16, 2005).

[220] NAB Reply Comments at 26.

difficult and less desirable for DBS operators to retransmit distant broadcast signals to unserved households and would further limit the availability of programming to consumers who do not get local programming service. As currently written, the statute and rules allow these households to receive programming from a distant signal when local stations, the preferable choice for receiving programming, are not available. If the cable provisions were applied to DBS, DBS operators would be allowed to retransmit any distant broadcast signals to any subscriber, whether or not the subscriber is considered an unserved household, and whether or not local-into-local service is provided, subject to retransmission consent and network non-duplication and syndicated exclusivity protection, as is currently permitted under the cable rules. Although no one requested this option, it would permit DBS operators additional choice for the services they provide their subscribers, while still protecting the exclusivity rights of local stations. This alternative would require a statutory amendment to the copyright law.

75. Regulatory parity is generally a worthy goal where disparities are not warranted by special circumstances. Consistent with the different technologies involved, every effort should be made to apply the same rules to cable operators, DBS operators, and other MVPDs. Thus, to the extent the Commission's exclusivity and retransmission consent rules are different with respect to cable and DBS and create distortions in the competitive landscape, we generally recommend that Congress continue its efforts to harmonize applicable laws to the extent feasible in light of differences in technology. However, consistency of policies and rules is a matter not just of communications policy but copyright policy as well: a large part of this effort will necessarily involve the consideration of copyright issues, which the Copyright Office is currently examining in compliance with SHVERA.[221] We believe a comprehensive analysis of regulatory disparities and possible measures to achieve greater parity should await the outcome of those efforts so that policy objectives relating to communications law and copyright law can be coordinated. Accordingly, we conclude that specific suggestions for change should await the results of the companion Copyright Office inquiry. Finally, in considering whether to apply the DBS rules to cable or the cable rules to DBS or developing some other alternatives, Congress should seek solutions that rely, to the extent feasible, on market mechanisms rather than detailed administrative rules.

D. Rural Cable and Digital Broadcast Signals

76. Section 208 requires that we examine the effects of the retransmission consent, network non-duplication, syndicated exclusivity, and sports blackout rules on the ability of rural cable operators to compete with DBS in offering digital broadcast signals. Below we describe commenter positions and proposals on this subject. Having reviewed the record in this proceeding, we find that commenters have not demonstrated that the rules are affecting the ability of rural cable operators to compete with DBS in the provision of digital broadcast signals. Accordingly, we do not recommend any changes to relevant statutory or rule provisions at this time. We note, however, that our most recent *Notice of Inquiry* on the state of video competition seeks additional information on competition in rural markets.[222] To the extent that relevant evidence is forthcoming in that proceeding, we will report our findings to Congress in our next annual video competition report.

1. Comments

77. DBS operators assert that cable operators have market power, while rural cable operators assert that DBS operators have market power. DirecTV contends that cable operators are often the

[221] SHVERA, §§ 109-110.

[222] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Notice of Inquiry, MB Docket No. 05-255, FCC 05-155, ¶ 23 (rel. Aug. 15, 2005).

dominant MVPDs in their franchise areas and may be described as local monopolies in many of the largest DMAs.[223] DirecTV claims that a cable operator's share of the local MVPD market often gives it sufficient market power to refuse to pay cash for retransmission consent, while DirecTV's small share of the local MVPD market requires it to pay cash.[224] Cable commenters allege that regulatory disparities not only hinder competition generally, but will increasingly hinder rural cable operators' ability to carry digital broadcast signals. NCTA argues that DBS has a number of advantages in households that do not receive analog broadcast service and will soon have additional advantages in households that do not receive digital broadcast service.[225] ACA states that there is a growing disparity in market power between DBS and rural cable operators stemming from the inability of some rural cable operators to receive and retransmit good quality local broadcast signals to their subscribers.[226] According to ACA, DBS's local-into-local service is increasingly able to provide good quality local broadcast signals to DBS subscribers.[227] NCTA further points out that many broadcasters are not reaching their entire analog population with a digital signal.[228] NCTA states that this is usually not a problem with respect to the delivery of analog signals because cable operators can receive signals from translators, but that translators do not currently have second channels for the purpose of digital signal transmission and will likely not be available as a source of digital signal delivery until the end of the digital transition.[229]

78. ACA claims that these problems can be solved by granting rural cable operators access to satellite-delivered local broadcast signals on nondiscriminatory prices and terms.[230] DBS operators disagree, stating there is no reason to force DBS operators to provide broadcast signals to competitors.[231] EchoStar states that DBS operators do not control a bottleneck or essential facility to which competitors need nondiscriminatory access.[232] EchoStar and DirecTV argue that they have established facilities for receiving local broadcast signals in markets where they offer local-into-local service, and there are no barriers preventing rural cable operators from making arrangements for the delivery of good quality local broadcast signals to their cable headends.[233]

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[223] DirecTV Reply Comments at 3.

[224] *Id.*

[225] NCTA Comments at 5-10.

[226] ACA Comments at 1-2.

[227] *Id.* at 5.

[228] NCTA Comments at 7. NCTA states that approximately 40 percent of stations operating pursuant to special temporary authority ("STA") are reaching less than 70 percent of their analog population with a digital signal. They also state that the FCC recognizes that households unable to receive these digital signals "are more likely to be in outlying or rural areas . . ." *Id.* (quoting *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279, 18315 ¶ 79 (2004).

[229] NCTA Comments at 6-7.

[230] ACA Comments at 6. ACA proposes the following statutory change: "In markets where a satellite carrier delivers local-into-local signals, that satellite carrier shall make those signals available to MVPDs on nondiscriminatory prices, terms and conditions, when: (i) the MVPD cannot receive a good quality signal off-air; and (ii) the MVPD has the consent of the broadcasters to retransmit the signal." *Id.* at 6-7.

[231] EchoStar Reply Comments at 1-3; DirecTV Reply Comments at 7-9.

[232] EchoStar Reply Comments at 1.

[233] EchoStar Reply Comments at 1-2; DirecTV Reply Comments at 7-8.

79. NCTA and ACA also make other comments and proposals concerning the effects of our retransmission consent, non-duplication and syndicated exclusivity rules on competition in rural areas, which we discuss above in Sections III.A. and III.B.[234] Although the comments and proposals would apply to a broader group of NCTA and ACA members than just rural cable operators, NCTA and ACA assert that their comments are particularly important to rural cable operators' ability to provide digital signals to subscribers.[235] For example, ACA contends that the practice of linking carriage of broadcast signals to carriage of other affiliated programming diverts resources from rural cable operators that could be used to deliver digital signals.[236] NCTA contends that its proposals will allow rural cable operators to compete more effectively with DBS, although they do not assert that their proposals will spur competition with respect to provision of digital signals in particular.

80. Network Affiliates state that the retransmission consent, network non-duplication, syndicated exclusivity, and sports blackout rules do not treat digital signals differently than analog signals, so the current regulations do not disadvantage rural cable operators relative to satellite carriers.[237] With respect to the sports blackout rule, the Professional Sports Leagues explain that most sports events are held in large, urban areas, so the sports blackout rule is rarely applicable to rural cable operators.[238] Thus, they argue, the sports blackout rule does not hinder the ability of rural cable operators to compete with DBS.[239]

81. Pioneer maintains that some broadcast satellite stations in rural areas fail to provide a strong signal to the entire geographic area where they assert network non-duplication and syndicated exclusivity protection.[240] Pioneer states that the poor quality broadcast signal is attributable to the broadcaster's failure to invest in adequate transmission facilities.[241] Pioneer asks the Commission to modify the network non-duplication rule so that where a local affiliate station's signal is weak or absent, the cable operator would be permitted to carry the signal of a neighboring or distant station affiliated with the same broadcast network, either exclusively, or in addition to the local affiliate.[242] Pioneer requests that it be permitted to import distant broadcast network signals without being subject to the network non-

[234] ACA complains that some broadcast networks use network non-duplication and syndicated exclusivity solely to raise the price (monetary or in-kind) of retransmission consent. ACA Comments at 4. According to ACA, broadcasters are targeting rural cable operators in the hopes of obtaining at least $860 million from rural MVPD subscribers in the next round of retransmission consent negotiations. *Id.* ACA advances proposed remedies to this alleged problem in its separately-filed Petition for Rulemaking. *Id. See also* n. 128, *supra,* Section III.B.1., *supra.* NCTA proposes that broadcast stations not be permitted to exercise network non-duplication or syndicated exclusivity rights if they choose retransmission consent. NCTA Comments at 12. *See also* Section III.B.1., *supra.* ACA proposes mandatory arbitration for retransmission consent disputes. ACA Comments at 3. *See also* Section III.A., *supra.*

[235] ACA Comments at 1, 4. NCTA Comments at 8.

[236] ACA Comments at 7.

[237] Network Affiliates Comments at 17-18.

[238] Professional Sports Leagues Comments at 7.

[239] *Id.*

[240] Pioneer Comments at 5. Pioneer's Comments were initially misfiled in another docket. They were submitted to the record in this proceeding on June 14, 2005.

[241] *Id.* at 2.

[242] *Id.* at 7.

duplication rule.[243]

2. Discussion

82. As we discuss in greater detail in Sections III.A. (retransmission consent) and III.B. (network non-duplication and syndicated exclusivity rules), these rules are integral to achieving core policy objectives, including the promotion of localism. These policy objectives are no less important in rural areas than in other geographic areas. Moreover, the record does not show that the rules are harming competition between DBS and rural cable. We also find that there is not sufficient evidence in the record to show that broadcasters are using the network non-duplication and syndicated exclusivity rules to raise prices for rural MVPDs. Accordingly, we will not modify the rules on such grounds.[244]

83. We also decline to adopt or reco mend to Congress the proposals by ACA and Pioneer relating to signal access. Under the Commission's signal carriage rules, there are no restrictions on the manner in which the broadcaster's signal is delivered to the cable operator's headend.[245] We recognize that sharing facilities with DBS operators is one option that could be employed to deliver broadcast signals to rural cable operators' headends, but other alternatives, including fiber, microwave or fixed satellite service, could be used. We do not believe that there is a need to require that DBS operators share their facilities with their competitors – incumbent cable operators – although we would support any mutually agreed upon arrangements among the parties. Thus, we do not find it appropriate to recommend this option to Congress. Similarly, we decline to modify the network non-duplication rule in the manner proposed by Pioneer.[246] Stations that elect must-carry are required by the Commission's rules to deliver a good-quality signal to the headend. With respect to stations that elect retransmission consent, we would expect that the delivery of a good-quality signal to the cable headend would be one of the terms discussed and resolved by the parties in their negotiation for a carriage agreement. Broadcasters and cable operators are free to negotiate compensation terms that include the cost of delivering a good-quality signal to the cable headend. However, stations that elect retransmission consent may invoke the network non-duplication rules even if they are not carried. For the reasons set forth above, we are reluctant to dilute those rights.

E. Other Issues

84. In addition to the proposals discuss d above, commenters provide other suggestions on narrower issues for the Commission to recommend to Congress. EchoStar provides several recommendations related to the must-carry/retransmission consent process. It requests that the Commission streamline the must-carry/retransmission consent election rules by setting up a clearinghouse, as part of an electronic system, by which television stations can make carriage requests

[243] *Id.* Pioneer states that it wants to deliver distant signals under the same provisions and conditions that are afforded to DBS operators. Unlike DBS, however, Pioneer suggests that it would be required to obtain retransmission consent. Pioneer does not mention the syndicated exclusivity rule in its comments.

[244] The findings and conclusions in our report are not intended to a dress the merits of ACA's separately-filed petition for rulemaking.

[245] In the case of a broadcast station electing must carry, the broadcaster is required to deliver a good quality signal to the cable system or DBS local receive facility, including covering any costs involved. *See* 47 C.F.R. §§ 76.55 and 76.66.

[246] Pioneer Comments at 7.

and by which satellite carriers can send responses.[247] We do not have any evidence in the record showing that the must-carry/retransmission consent election rules are in any way burdensome or inefficient and in need of streamlining. SHVERA directed the Commission to revise its rule governing notification of commencement of new local-into-local service by requiring satellite carriers to notify broadcasters via certified mail at the address provided in the Commission's consolidated database system.[248] Also, Commission rules require that must-carry/retransmission consent elections be made by certified mail, a process that ensures that there is no dispute over a station's election choice.[249] These procedures are clear and are intended to eliminate errors and make sure that notices are made in compliance with the rules. Accordingly, we decline to implement EchoStar's request at this time.

85. Finally, EchoStar and NCTA recommend certain changes to the copyright law. EchoStar requests that satellite carriers' legal ability to carry distant signals (analog or digital) be made permanent, rather than expire on December 31, 2009.[250] EchoStar also points out that there is now a sunset date of December 31, 2008, on the significantly viewed station waiver provision that local broadcasters may grant, allowing certain otherwise ineligible subscribers to receive such signals, and recommends that the waiver process be made permanent or be made to coincide with the distant signal provision sunset date of December 31, 2009.[251] Other commenters oppose EchoStar's requested changes to copyright la ,[252] and contend that issues concerning the sunset date are beyond the scope of this proceeding.[253] NCTA argues that DBS pays lower copyright royalty fees than all but the smallest cable operators.[254] NCTA recommends that both cable and DBS pay the lower royalty fee for the same distant broadcast network signals.[255] MPAA contends that NCTA's proposals are outside the scope of this proceeding and should be disregarded.[256] We agree. As Congress has asked that we evaluate communications policy, and not copyright law, in this proceeding, we decline to consider the recommendations of EchoStar and NCTA and defer to the Copyright Office's expertise in these areas. We expect that these issues will be considered when the Copyright Office evaluates the operation of copyright licenses under sections 109

[247] EchoStar Comments at 15. EchoStar suggests that this process would significantly reduce the burdens on broadcasters and satellite carriers and cut down on mailing errors and disputes over the timeliness of requests and responses. *Id.* at 15-16. As part of its streamlining proposal, EchoStar further suggests that the Commission establish a default response for a satellite carrier's acceptance of a television station's carriage request, in the absence of an affirmative denial by the carrier, when the television station: (1) previously requested must-carry for the current election cycle; (2) is currently being carried by the carrier; and (3) makes the same carriage request for the next election cycle. *Id.* at 16. For the reasons discussed in para. 84, *supra*, we find that this default response suggestion is unn cessary.e

[248] 47 U.S.C. § 338(h)(2)(A) added by Section 205 of SHVERA. *See Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Procedural Rules,* 20 FCC Rcd 7780 (2005). *See also* 47 C.F.R. § 76.66(d)(2)(ii).

[249] *See* 47 C.F.R. § 76.66(d)(1)(ii).

[250] EchoStar Comments at 13-14.

[251] *Id.* at 14-15.

[252] Network Affiliates Reply Comments at 33-34.

[253] MPAA Reply Comments at 7.

[254] NCTA Comments at 10.

[255] *Id.* at 12.

[256] MPAA Reply Comments at 4-6.

and 110 of SHVERA.

IV. CONCLUSION

86. In fulfillment of the requirements of section 208 of SHVERA, we have considered the effect of the retransmission consent, network non-duplication, syndicated exclusivity, and sports blackout rules on competition among MVPDs and on rural MVPDs' ability to compete with DBS operators in the delivery of digital broadcast signals. We have evaluated commenters' positions and proposals with respect to these rules. For the reasons set forth above, we do not recommend any changes at this time to the statutory provisions relating to Commission rules under consideration in this Report.

APPENDIX

LIST OF COMMENTERS

Initial Comments

1. ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates Association (Network Affiliates)
2. American Cable Association (ACA)
3. BellSouth Corporation and BellSouth Entertainment, L.L.C. (BellSouth)
4. Duhamel Broadcasting Enterprises (Duhamel)
5. EchoStar Satellite L.L.C. (EchoStar)
6. Joint Cable Commenters (Advance Newhouse Communications, Cox Communications, Inc., and Insight Communications) (Joint Cable Commenters)
7. National Association of Broadcasters (NAB)
8. National Cable Television Association (NCTA)
9. NBC Universal, Inc. (NBC)
10. The Professional Sports Leagues (Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the National Hockey League, and the Women's National Basketball Association) (Professional Sports Leagues)
11. Satellite Broadcasting and Communications Association (SBCA)
12. The Walt Disney Company (Disney)

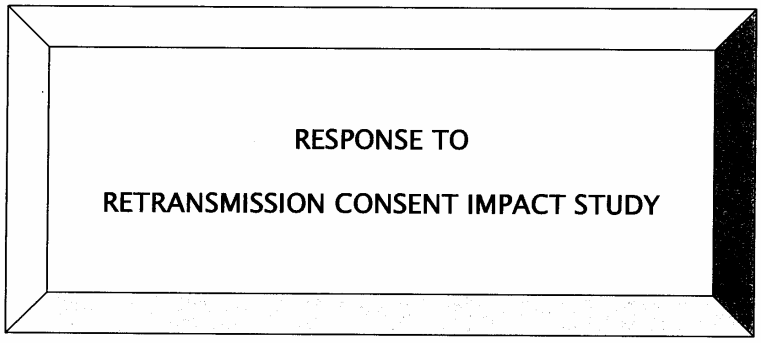
Reply Comments

1. ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates Association (Network Affiliates)
2. DIRECTV, Inc. (DirecTV)
3. Discovery Communications, Inc. (Discovery)
4. Duhamel Broadcasting Enterprises (Duhamel)
5. EchoStar Satellite L.L.C. (EchoStar)
6. Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. (Fox)
7. Microcom (late-filed) (Microcom)*
8. Motion Picture Association of America, Inc. (MPAA)
9. Named State Broadcasters Associations (NSBA)
10. National Association of Broadcasters (NAB)
11. NBC Universal, Inc. and NBC Telemundo License Co. (NBC)
12. Pioneer Telephone Association, Inc. d/b/a/ Pioneer Communications (late-filed) (Pioneer)
13. The Professional Sports Leagues (Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the National Hockey League, and the Women's National Basketball Association) (Professional Sports Leagues)
14. Time Warner Cable Inc. (Time Warner)
15. Viacom (Viacom)
16. The Walt Disney Company (Disney)

* - Originally, Microcom misfiled in MB Docket No. 05-25.

Other Filings

1. Joint Cable Commenters (Advance Newhouse Communications, Cox Communications, Inc., and Insight Communications) (May 23, 2005)
2. NBC Telemundo License Co. (June 10, 2005)
3. National Association of Broadcasters (June 10, 2005)
4. Discovery Communications, Inc. (August 10, 2005)
5. The Walt Disney Company (August 10, 2005)
6. National Association of Broadcasters (August 11, 2005)
7. The Walt Disney Company (August 25, 2005)



Mark R. Fratrik, Ph.D.

BIA Financial Network

February 10, 2006

BIA Financial network

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Introduction

A recently submitted study by Arlen Communications, Inc. titled "Retransmission Consent: Its Impact on Customers of Small and Rural Cable Systems" ("Arlen Study")[1] was purported to present information on the position of small-market and rural cable systems and how those positions were made worse by "the economic demands of broadcast television stations and major broadcast networks and programming conglomerates."[2] The purpose of this paper is to carefully review that study and assess its findings.

Simply put, many of the arguments and analyses presented in the Arlen Study either omit or mischaracterize true broadcast industry conditions and lack sound economic reasoning. In general, the study mischaracterizes the outcomes of retransmission consent negotiations as being something other than the result of negotiations between two parties (local cable systems and television stations) that both are facing increased competition. In fact, a fundamental premise of this study appears to be that local cable systems are finally facing competition where once they were the monopoly provider of multiple video programming channels, and that broadcasters are to blame. Increased competition is, of course, precisely what Congress hoped to stimulate in providing retransmission consent.

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[1] The Arlen Study was submitted in conjunction with the "Statement of Matt Polka, President and CEO American Cable Association Before the Senate Commerce Committee Hearing on Video Content Tuesday January 31, 2006."

[2] Arlen Study, p. 1.

Financial Burdens on Local Cable Systems

The Arlen Study devotes inordinate effort seeking to establish that local over-the-air television broadcasters are burdening small-market and rural cable systems with incredible financial costs. According to this study, it is inappropriate that these television broadcasters are demanding payments for carriage because the local cable systems are expanding the reach of the stations. The Arlen Study suggests that local television stations should be *paying* the local cable systems for this carriage.[3]

The first, and most obvious, rejoinder to this proposal is simply to ask why, if the Arlen analysis is correct, local cable systems do not ask for and receive payments for carriage in retransmission consent negotiations? Why do they, instead, incur these alleged extraordinary burdens by paying local over-the-air television broadcasters? The answer is that local cable systems themselves benefit, and benefit greatly from the carriage of local, over-the-air television stations. This benefit is especially significant in areas where there may be an insufficient ability to receive local, over-the-air television broadcasters. Local cable systems attract more subscribers

[3] Arlen Study, p. 13.

when they provide local television stations. Without these local stations, local cable systems would not be able to charge as much for their whole package of services.[4]

If the "broadcasters should pay cable operators" logic is correct it should also be the case that cable networks, which have no reach outside cable carriage, should also pay cable systems. That proposition proves the absurdity of Arlen's theory. In fact, the opposite occurs, with cable systems paying national cable networks for their programming.

It is ironic that the Arlen Study cites the expanded coverage of local broadcasters as a reason for charging broadcasters, when the delivery of these signals was the only reason many cable services came into existence in the first place and their carriage continues today to be an important aspect of their services. Other multichannel program delivery services (e.g., DBS providers and the recent telephone companies providing video services) also clearly see the great value in providing local television stations, as they are very quick to announce their deals with local television stations so as to attract new subscribers. Indeed, a study by DBS providers once revealed that the predominant reason consumers decided not to acquire DBS service was DBS' then failure to provide local television stations.

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[4] In both of the case studies discussed in the Arlen Study, there are multiple stations with the same network affiliation being carried by the local cable systems. As discussed later, some of these stations are significantly viewed in these areas and are *not* located within the boundaries of the local television market and hence, there is no requirement that they be carried. Accordingly, the local cable operators' decision to carry these duplicative out of market affiliates can only be based on their conclusion that the local population wants to see these stations and those local cable systems will benefit from carrying these signals (i.e., gaining more subscribers). In other words, in both of the two case studies, the local cable system voluntarily enters into arrangements with out-of-market television stations.

Claiming that local cable systems should not "have to pay" for retransmission consent flies in the face of the reasoning (and supporting evidence) presented when that section of the Communications Act was amended in the 1992 Cable Consumer Protection and Competition Act. The sections on retransmission consent negotiations were included at that time so as to "level the playing field" between the local cable systems, that had the only video service wire going into local homes, with the local television stations whose programming attracted the greatest viewing shares. Prior to the passage of this legislation, local cable systems were benefiting from carriage of local television stations without having to negotiate to share those benefits. While today there is more competition in the delivery of multiple channels of video, local cable systems still maintain a very significant position in that market, and thus, have a very strong position in any retransmission consent negotiations. Painting a picture of local cable systems being severely disadvantaged in these negotiations simply does not reflect the market conditions still present today.

Competitors to Cable

Direct Broadcast Satellite systems (DBS), competitors to local cable systems, are characterized in the Arlen Study as having advantages over cable systems in providing local over-the-air television stations. While DBS providers do not face the exact same carriage regulations as cable, the implication that cable suffers a competitive disadvantage is inaccurate. While DBS providers do not have to offer local into local service in any given market, when they do, they face a "carry one – carry all" requirement, essentially the same as cable. These DBS

providers must negotiate, just like local cable systems, with each local over-the-air television station electing retransmission consent to secure the rights to retransmit those stations.[5]

DBS retransmission consent negotiations provide much needed competition to local cable systems. The Arlen Study recognizes the importance of carrying local stations in order to provide competition:

> "[T]he importance of over-the-air local channels is underscored by the DBS experience. When satellite carriers were able to add 'local-into-local' service (i.e., the over-the-air stations from the Baltimore-Washington area), Atlantic Broadband lost a significant number of subscribers."[6]

In other words, DBS negotiations with local over-the-air television stations provide these stations with valued competition in their negotiations with cable and vice versa.

Page seven of the Arlen Study boldly asserts that, "satellite providers do not face the same legal restrictions that cable operators face when it comes to carriage of broadcast signals for nearby markets." While this statement is true, it cuts against cable in that until late last Fall, cable was permitted to carry so-called "significantly viewed" stations from nearby markets without payment of any copyright fees, while DBS had no such rights. It was only with the recent passage of the Satellite Home Viewer Extension and Reauthorization Act that DBS was provided with comparable rights, but cable's ability to carry these stations for over forty years has been a large competitive benefit.

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[5] There is a contention in the Arlen Study (p. 7) that since DBS providers charge separately for the local-into-local services that they can pass the cost of retransmission consent on to consumers. As mentioned earlier, one of the benefits of local cable service has long been the provision of local over-the-air television stations enticing many households to subscribe. In other words, local cable systems have been charging local consumers for these local stations and realizing the benefits of providing these local stations even before they had to pay for retransmission consent.

In comparing the regulatory regimes that restrict the ability of cable and satellite to import distant non-significantly viewed signals into a local station's market cable also has the advantage. A local station's zone of program exclusivity protection for cable is only 35 or 55 miles depending on market size, while for satellite it is the generally larger area within which a station provides a Grade B intensity signal.

Network Non-Duplication Rules and Their Impact

Another complaint raised in the Arlen Study as constraining local cable systems is that they cannot negotiate for carriage with most affiliates outside of the local television market that are offering the same network programming.[7] What the Arlen Study is referring to, but never names in the report, is the long standing FCC policy, as implemented in its network non-duplication rules, of enabling local affiliates to enforce exclusive program rights they secure from their networks in the marketplace. The rationale for this regulation is simply to enable the preservation of local network affiliate television stations. Knowing their market area will be preserved and that local viewers must access through them their network's programming provides the incentive for these local television stations to invest in and promote their programming. Without that guarantee, local affiliates may not be able to obtain revenues necessary to support their locally produced programs and to otherwise fulfill their obligation to their local communities. In other words, the foundation of localism is encouraged by the network non-duplication rule.

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[6] Arlen Study, p.23.

[7] "Market exclusivity: Cable systems can only carry specific in-market broadcast stations, with only narrow exemptions for channels from nearby markets." Arlen Study, p.2

In its criticism of the network non-duplication rule as being harmful to local communities, the Arlen Study fails even to acknowledge, much less discuss, that exclusive market areas is a common business model in many industries. From retail tire outlets to fast food restaurants, franchises are awarded to individual entities on the basis that they will have geographic areas where there will *not* be other outlets selling the same brand. Like over-the-air broadcasters, these exclusive market areas are negotiated so as to provide the local merchant with the incentive to invest in his/her own outlet. Such geographic exclusivity can be pro-competitive, especially if it strengthens competition among different retail outlets. In the case of video programming, there is certainly an incredible amount of competition for attracting audiences, and as such, there is no concern about any anti-competitive effects of the network non-duplication rules.[8]

Inability to Provide Broadband Services

The Arlen Study repeatedly asserts that heavy financial burdens imposed by local over-the-air television stations in their retransmission consent demands will mean that "some local cable operators may not be able to introduce or upgrade their systems to provide innovative and desirable broadband services."[9] Left completely unexplained is the leap from how the outcome of retransmission consent negotiations results in preventing cable operators from investing in useful broadband services. If the local cable systems determine that there is enough demand for these broadband services, and that consumers are willing to pay for those services, then the

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[8] In fact, the network non-duplication rule actually promotes competition by encouraging local television stations to invest in their programming to compete against the hundreds of other non-broadcast programming options now available.

systems will make the necessary investments in order to provide those services.[10] If there is not enough retained earnings from their video services, due in large part to the increase in competition, then the local cable system can secure outside funding for that investment with the increased revenues that the cable system will generate to pay for that debt.

In fact, as the Arlen Study points out, many small and rural cable systems are investing in providing broadband services.[11] The two case studies that the Arlen Study cites – La Grange, TX and the Maryland Eastern Shore[12] – **both** provide these broadband services in apparent contradiction to Arlen's claim that such services are being stymied by local television stations retransmission consent payments.[13] What is apparent from the actual statistics provided in the Arlen Study on the provision of cable broadband services and the two case studies described is simply that there may be cases where it is not economically efficient for local cable systems to

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9 Arlen Study, p. iii.

10 Many of these local cable systems in small markets are actually owned by large cable multiple system operators (MSOs) who have ready access to investment capital. While the top four MSOs serve more than 50 percent of the cable subscribers in markets ranked 101 and higher, the top ten broadcast groups own only 3% of the stations in those markets. See NAB, et al. Opposition to American Cable Association Petition for Rulemaking. RM No. 11203, filed April 18, 2005, at Appendix A.

11 Arlen Study, p. iii citing that 50% of all cable systems with fewer than 1,000 subscribers offer high-speed Internet.

12 Discussing the Maryland Eastern Shore cable system is very interesting as this cable system was only recently (2004) purchased by Atlantic Broadband. If the situation with retransmission consent payments was so dire hindering the ability of cable systems to provide broadband services, why did this company purchase this local cable system?

13 It is also very significant to note that in both of these case studies, the local cable system's penetration is lower than the national averages. The Arlen Study cites the competitive pressure of DBS providers in both cases as being a major cause of the cable systems' low subscriber counts.(Arlen Study, pp. 19 and 23)

provide these services, not that local television stations are somehow preventing them from doing so.

Price Increases Borne by Local Cable Systems

Arlen makes several references to the increasing financial burden of local cable systems due to the price increases charged by cable networks.[14] The fact that cable networks can charge more for their programming is due to the value of those programs to local consumers from which the local cable system also benefits.[15] Moreover, the increased prices that these cable networks have realized are further evidence of the value of local affiliate stations. While the affiliates have seen some erosion in their viewing levels, they still command a large lead over any individual cable network viewing level.

The erosion of the audiences for local over-the-air television stations is noted in the Arlen study when it cites the decline of primetime viewership from 90% in the early 1980s, to less than 50 percent today.[16] At the same time, however, the Arlen Study cites the "ever-increasing power, [of] major broadcast networks and group broadcasters.."[17] This contradiction in the analysis just highlights the fact that the retransmission consent agreements are the result of negotiations between two parties –local cable systems and local over-the-air television stations facing increased competition – in a free marketplace.

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[14] See Arlen Study, p. ii.

[15] In addition to higher cable service charges, local cable systems generate higher cable advertising revenues from more popular cable network programming.

[16] Arlen Study, p. 5.

[17] Arlen Study, p. 9.

Mischaracterization of the Over-the-Air Television Broadcast Industry

In addition to suggesting that over-the-air television stations are losing significant audiences while increasing their market power, the Arlen Study makes an egregious error in describing the relative performance of the television industry. The study states:

> "... that local broadcast stations' advertising revenue has been growing at the rate of 5.6 percent annually from 2002 to 2005. This rate is well above the Gross Domestic Product growth, which was a mere 3.8 percent during the third quarter of 2005. This recent figure was well above the growth rate earlier this year and during previous years, when it sometimes hung in the 2 percent range."[18]

The unexplained mystery in this flawed analysis is how local over-the-air television stations have been able to outperform the general economy in the face of increased competition from more video choices. The answer is the Arlen Study compares the total **nominal** growth rate of television advertising revenues (which includes the impact of inflation) with the **real** rate of growth of the overall economy (which does *not* include the impact of inflation).[19] This comparison is misleading.

In fact, when inflation **is** included in the GDP, the rate was 5.7%.[20] Moreover, according to BIA Financial Network estimates the total television station advertising revenue growth grew at a compounded annual growth rate of 2.7%, significantly less than the growth rate of the U.S. economy. Accordingly, the growth rate of local station revenues did not exceed the GDP growth

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[18] Arlen Study, p. 12.

[19] It should have been apparent that care was not taken in this comparison when the study made a reference to a "mere 3.8 percent" growth in the overall economy. That 3.8 percent quarterly growth rate in the third quarter of 2005 is an indication of a strong growth rate in the economy and well above the historical growth rates in the U.S. economy.

[20] Bureau of Economic Analysis, U.S. Dept. of Commerce Quarterly Gross Domestic Product Estimates 1/27/06.

rate. Significantly, by comparison, between 1992 and 2003 cable's total revenue increased by 147% from $20.760 billion to $51.245 billion.[21]

Conclusion

The Arlen Study is so riff with mischaracterizations, omissions, contradictions and flawed analyses that it is of little value in any meaningful discussions about the retransmission consent marketplace. Its conclusions that broadcasters should pay cable operators for carriage of their signals ignores marketplace realities, the enormous economic benefits carriage of local television stations provides to cable, and the intent of Congress in creating retransmission consent rights.

While the carriage and program exclusivity regulatory regimes for DBS are in some ways different than for cable, these differences sometimes favor cable. The Arlen Study's criticisms of the network non-duplication rules are not valid. Those rules merely provide local affiliates with the means to enforce exclusive geographic market provisions obtained in the programming marketplace – the same type of geographic market exclusivity common in many other industries.

The Arlen Study's theories on how fees cable operators might pay for retransmission consent will prevent those operators from providing broadband facilities are serious flawed. If broadband is a viable business, cable operators have many ways to finance it.

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[21] *See*, NCTA "Cable Developments 2004" at 14; *Annual Assessment of the Status of Competition in the Market For Delivery of Video Programming*, FCC 05-17 (released Feb 4, 2005) at ¶ 19 ("Eleventh Annual Report"). Moreover, according to the FCC's 2004 Price Survey, the average monthly cable rate increased 5.6% and 3.6% for non-competitive and competitive cable systems respectively, well ahead of the Consumer Price Index increase of only 1.1%. Eleventh Annual Report at ¶¶ 26-27.

The Arlen Study's assertions that local television stations are increasing their market power while experiencing audience losses, and that local stations provide essential "must have" programming for cable, but that stations should pay for carriage are contradictory and irreconcilable.

The Arlen Study mischaracterizes the growth in local television station revenues while at the same time ignoring the much larger growth of cable revenues.

While the Arlen Study is correct that cable operators are facing increased costs and competition, there is no economic or competitive justification for solving the outcomes of the marketplace on the backs of local television stations which face similar marketplace issues.

National Association of
NAB
BROADCASTERS

David K. Rehr
President & CEO
1771 N Street, NW Washington, DC 20036-2800

January 19, 2006

The Honorable Nathan Deal
U.S. House of Representatives
2133 Rayburn House Office Building
Washington, DC 20515

Dear Representative Deal:

I am writing regarding the December 12th letter you and eight colleagues sent to Chairman Kevin Martin on the topic of retransmission consent agreements.

Retransmission consent negotiations are private, market-based discussions held between willing participants. This market system has evolved organically since Congress formulated retransmission consent and must-carry in the 1992 Cable Act. In establishing that framework, Congress recognized the importance of ensuring that all local television stations could obtain cable carriage. The must-carry assurance is therefore vital to a continuing America's system of free, over-the-air local television. The Supreme Court relied upon similar reasoning in two decisions that upheld the must-carry law.

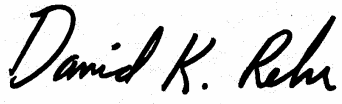
At the same time, Congress wisely recognized in the 1992 Act that cable operators derive great value from broadcasters' signals. Thus, retransmission consent negotiations are an important mechanism by which local television stations can obtain modest compensation when cable operators profit from broadcasters' property.

In some instances, where cable operators have resisted offering monetary compensation to the broadcaster, retransmission consent negotiations have enabled broadcasters to obtain alternative compensation, often in the form of carriage of other programming the station owns. Whether a station obtains compensation for the use of its signal in the form of money or, whether the station and the cable operator decide it would be mutually beneficial to instead structure an agreement around carriage of ancillary programming owned by the broadcaster, these private, market discussions between willing participants contribute to the health of free, over-the-air broadcasting.

At the same time, we are also cognizant of the concerns raised in your letter. In that vein, we look forward to continuing dialogue in the future with you and your colleagues on these matters. Should you or your staff have questions on any of these issues, please do not hesitate to contact me.

Thank you for your consideration of your local television broadcasters' views.

Sincerely,



David K. Rehr

cc: The Honorable Charles Bass
The Honorable Barbara Cubin
The Honorable Ed Markey
The Honorable Charles Norwood
The Honorable Joseph Pitts
The Honorable John Shimkus
The Honorable Ted Strickland
The Honorable Ed Whitfield

National Association of
NAB
BROADCASTERS

David K. Rehr
President & CEO
1771 N Street, NW Washington, DC 20036-2800

To: United States Senate
United States House of Representatives

From: David K. Rehr

Date: February 27, 2006

Re: Mischaracterization of Retransmission Consent Negotiations

Broadcasters' Negotiations with Cable on Retransmission Agreements are Fair and Market Driven When Exercised

Recent Study Backed by ACA Attempts to Confuse the Issue

A deeply flawed study prepared at the behest of the American Cable Association (ACA) purports to present information on the positions of small-market and rural cable systems and their retransmission consent relationship with local television broadcasters.

Retransmission consent negotiations are private, market-based discussions between willing participants. The market system has evolved organically since Congress formulated retransmission consent and must-carry in the 1992 Cable Act, when Congress wisely re ognized that cable operators derive great value from broadcasters' signals. Thus, retransmission consent negotiations are an important mechanism by which local television stations receive the acknowledged value that this programming brings to multi-channel video programming distributors (MVPDs).

To put the issue of retransmission consent in a more proper perspective and to accurately inform Congress, attached is a BIA Financial Network (BIAfn) analysis that highlights the contradictions and mischaracterizations of the study being touted by ACA.

1) **Although the study recognizes the great value broadcasters' signals provide to cable operators, it asserts that broadcasters should pay cable operators for carriage of their signals.** Cable wants it both ways. On one hand, they insist that local television broadcast programming is extraordinarily important and that they must have it to remain competitive. In the next breath, they argue that broadcasters should be paying cable companies for carriage of their signals.

2) **The study erroneously asserts that broadcasters are prohibiting cable from deploying new broadband services.** The study does not and cannot explain how the outcome of retransmission consent negotiations stymies cable operators from investing in new broadband services. Simply put, these market negotiations do not prevent cable from getting into other businesses.

3) **The flawed analysis is riddled with mischaracterizations.** It addresses the growth in local television station revenues, while ignoring the much larger growth

of cable revenues. The study also misrepresents differences in regulation between cable and satellite, implying that satellite enjoys competitive advantages it does not. Still further, the study criticizes network non-duplication, while completely ignoring that this rule preserves localism in broadcasting. It also fails to note that local franchises, similar to those enjoyed by local broadcasters, are common to many businesses.

Additionally, the FCC reviewed the current state of retransmission consent and in a September 8, 2005 report stated, **"Our review of the record does not lead us to recommend any changes to the retransmission consent regime at this time."**[1] The FCC further found:

1) **The regulatory policies established by Congress when it enacted retransmission consent are working.** They have resulted in broadcasters "being compensated for the retransmission of their station by MVPDs, and MVPDs obtaining the right to carry broadcast signals."

2) **Retransmission consent is fair.** The local television station "benefits from carriage because its programming and advertising will be carried" and the MVPD benefits because "the station's programming makes the MVPD's offerings more appealing to consumers." Further, the FCC noted that "as a general rule, the local television broadcaster and the MVPD negotiate in the context of a level playing field in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially is detrimental to each side."

3) **Consumers benefit from retransmission consent.** It is the consumer who ultimately benefits from retransmission consent by having access to local broadcast programming via an MVPD.

As you consider the retransmission consent positions being discussed on Capitol Hill, you should find this BIAfn study provides you with a more balanced and straightforward analysis of this issue. Should you have any questions, please feel free to contact me.

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[1]FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 2005), page 19.

National Association of NAB BROADCASTERS

David K. Rehr
President & CEO
1771 N Street, NW Washington, DC 20036-2800

February 23, 2005

The Honorable Fred Upton
U.S. House of Representatives
2183 Rayburn House Office Building
Washington, DC 20515

Dear Representative Upton:

On behalf of the National Association of Broadcasters' (NAB) 8,300 free, local radio and television stations and broadcast network membership, I am writing in response to a Dear Colleague circulated by Congressman Nathan Deal that addresses the current Federal Communications Commission (FCC) retransmission consent rules.

Local broadcasters enjoy a strong relationship with Representative Deal and appreciate his dialogue on broadcast issues. However, there are several aspects of the position he has taken that need to be clarified.

Retransmission consent negotiations between local television broadcasters and cable and satellite companies are private, market-based discussions. The retransmission consent rules do not guarantee any compensation, rather, the rules only provide an opportunity for the broadcaster to negotiate for compensation for the use of its signal. When enacting the 1992 Cable Act, Congress noted that some broadcasters would seek monetary compensation for the use of their signals, while others would consider "in kind" compensation, such as the right to program an additional channel on a multichannel video operator's platform. Additionally, in a September 8, 2005 report on retransmission consent, the FCC stated, *"...the local television broadcaster and the MVPD negotiate in the context of a level playing field...."* [1]

The FCC has rejected the need to alter the current structure. In the above-referenced report, the FCC stated, *"...our review of the record does not lead us to recommend any changes to the retransmission consent regime at this time."* [2] In short, the system is working as Congress intended. Thus, it is the September 8 study that provides the FCC's view on retransmission consent, not the study referenced by Representative Deal which goes to the effect of a la carte programming on cable prices and consumer choice. In fact, the words "retransmission consent" do not appear once in the FCC's 61-page report on cable a la carte.

Accepting additional programming is a decision made by the cable operator, not the broadcaster. Broadcasters routinely give cable companies the choice to either pay for the right to carry a broadcaster's signal or consent to carrying additional programming. Cable's resistance to monetary compensation for local broadcast programming has resulted in bundling as an alternative.

Consumers often benefit from arrangements that enable broadcasters to serve viewers with yet more locally focused programming. Through retransmission consent negotiations, the ABC affiliate in Washington, Channel 7, has expanded News Channel 8, offering news, weather and public affairs programming. Belo Broadcasting has obtained carriage of its regional cable news channel, which serves viewers in Washington, Oregon, Montana, Alaska, Idaho and California through retransmission consent negotiations. LIN Television used retransmission consent negotiations to provide local weather information on separate channels carried by cable systems.

Recently, some in the cable industry have distorted the issue, arguing that smaller cable operators are at a disadvantage when negotiating with broadcasters. In the 110 smallest television markets, a majority of cable subscribers are served by one of the four largest cable operators. By contrast, only about three percent of the television stations in these markets are owned by one of the top ten television groups. In reality, small market, local television broadcasters are actually required to negotiate with large cable conglomerates for carriage.

Cable operators derive enormous value from carrying local broadcasters' signals. Before the retransmission consent system was created, cable would simply take broadcasters' product – our signals and programming – and use it to attract subscribers, without the station's consent. Retransmission consent rules simply ensure that local stations have the opportunity to negotiate for compensation for the use of their signal.

While we agree with Congressman Deal that consumers should have programming choice, we disagree with the assertion that the rules permitting retransmission consent negotiations somehow reduce that choice. Rather, retransmission consent has benefited viewers in many situations by increasing their access to programming such as local news. Turning back the clock to an era when cable monopolies took stations' signals, without permission or compensation, will do more to restrict programming choice than enhance it. Thank you for your consideration and should you have questions, please do not hesitate to contact me or NAB Government Relations at 1-202-429-5301.

Sincerely,

David K. Rehr

David K. Rehr

cc: United States House of Representatives

[1] FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 2005), page 25.

[2] Id, page 19.

National Association of
NAB
BROADCASTERS

David K. Rehr
President & CEO
1771 N Street, NW Washington, DC 20036-2800

February 23, 2005

The Honorable Ed Markey
U.S. House of Representatives
2108 Rayburn House Office Building
Washington, DC 20515

Dear Representative Markey:

On behalf of the National Association of Broadcasters' (NAB) 8,300 free, local radio and television stations and broadcast network membership, I am writing in response to a Dear Colleague circulated by Congressman Nathan Deal that addresses the current Federal Communications Commission (FCC) retransmission consent rules.

Local broadcasters enjoy a strong relationship with Representative Deal and appreciate his dialogue on broadcast issues. However, there are several aspects of the position he has taken that need to be clarified.

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While we agree with Congressman Deal that consumers should have programming choice, we disagree with the assertion that the rules permitting retransmission consent negotiations somehow reduce that choice. Rather, retransmission consent has benefited viewers in many situations by increasing their access to programming such as local news. Turning back the clock to an era when cable monopolies took stations' signals, without permission or compensation, will do more to restrict programming choice than enhance it. Thank you for your consideration and should you have questions, please do not hesitate to contact me or NAB Government Relations at 1-202-429-5301.

Sincerely,

David K. Rehr

David K. Rehr

cc: United States House of Representatives

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[1] FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 2005), page 25.

[2] Id, page 19.



THE ABC TELEVISION AFFILIATES ASSOCIATION
THE CBS TELEVISION NETWORK AFFILIATES ASSOCIATION
THE FBC TELEVISION AFFILIATES ASSOCIATION
THE NBC TELEVISION AFFILIATES ASSOCIATION

March 16, 2006

Representative Robert Aderholt
U.S. House of Representatives
1433 Longworth House Office Building
Washington, DC 20515

Dear Representative Aderholt:

A few cable trade associations and EchoStar launched a highly misleading campaign in a March 9 letter to all Members against the "carefully balanced combination of laws and regulations governing carriage of television broadcast signals, with the must-carry and retransmission consent regimes complementing one another."[1] The specific target of the attack is retransmission consent, which, in any other context, would be known by another name: the free market.

> ***Several cable trade associations and EchoStar are taking to the Hill the same tired arguments they have failed to sell the FCC – that the careful system of laws and regulations Congress and the FCC have crafted to govern the carriage of broadcast television signals is unfair to them. They now seek the extraordinary, government-mandated right to carry broadcast signals for free, even though they compete head-to-head with broadcasters and gain enormous economic value from carrying broadcast signals.***
>
> ***These parties are asking Congress to put a finger on the scale to favor their position in commercial negotiations because, for the first time in more than a decade, competition finally is taking hold. These demands are contrary to a decade of precedent, the advice of the FCC and Congress' own careful balancing of consumer, broadcast, cable and satellite interests. The FCC reported to Congress in a comprehensive study only months ago that the retransmission consent system is working, and the facts support***

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[1] *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA Report")* (Sept. 8, 2005).

this conclusion fully. Retransmission consent has led to more program diversity for American consumers – more local news, more local weather, more sustainable support for broadcasters' purchase of millions of dollars of programming on the open market for their local audiences. Congress should follow the recommendation of the expert agency and let the marketplace work.

I

In 1992, Congress overwhelmingly adopted the retransmission consent principle to provide broadcasters with the opportunity to negotiate with those wanting to retransmit their signals. The retransmission consent principle made possible a marketplace where cable operators and stations could bargain freely. Congress retained a must-carry requirement for public, minority and niche stations which it feared cable would otherwise refuse to carry out of a monopolistic desire to reduce competition.

Cable companies responded to the legislation by refusing, in unison, to pay any compensation for local broadcasters' signals, even though cable subscribers then spent more than half of their cable viewing time watching broadcasters' signals. The law does not require cable operators to agree to compensate broadcasters who seek retransmission consent, and in fact virtually all such agreements have not included cash compensation. Instead, cable companies entered into deals to carry programming that stations produced especially for cable presentation, and cable systems often paid to carry this programming.[2] Having insisted on such arrangements instead of payments for carriage of broadcast signals, the signatories of the March 9 letter now seek legislation to bar such arrangements, despite the plain fact that the public has benefited by the numerous local news, weather and sports channels that broadcasters produced and cable operators carried pursuant to retransmission consent agreements. Cable also now complains about the prospect of making payments for carrying stations' broadcast signals.

The March 9 letter also argues that retransmission consent negotiations are not fair because of broadcasters' exclusivity rights. These exclusivity rights have not, however, emerged from thin air. Local affiliates always have negotiated with networks and syndicated programming sources for exclusive programming rights within their markets. Congress and the FCC consistently have recognized this exclusivity as an essential component of the network-affiliate system and of America's unique system of licensing television stations to serve local communities. Advertisers on local broadcast stations expect and, indeed, pay for that exclusivity; these advertising revenues support stations' local programming and their ability to serve their communities. Geographic exclusivity, which is limited by the FCC's rules to narrowly defined geographic zones near stations' home communities, is pro-competitive because it strengthens local stations' ability to compete against the hundreds of non-broadcast and non-local programming networks offered by cable and satellite. The FCC's rules do not mandate

[2] This approach — refusing to pay cash for carriage, but agreeing to pay for new programming services that added value — was cable's conscious choice. *See* Mark Robichaux, *Cable Cowboy: John Malone and the Rise of the Modern Cable Business* 130 (2002) ("TCI, for one, refused to pay cash to any of the big networks but it indicated it might be willing make room on its systems for a new cable channel a broadcaster might like to start").

exclusivity, but merely enable broadcasters to protect the contractual rights for which they have negotiated. Programming exclusivity, and the system of local service it permits, is not a weakness of the American broadcast system, as the March 9 letter claims. It is its unique and highly valued strength.

II

The March 9 letter fundamentally distorts the FCC's position on the effectiveness and fairness of retransmission consent. As required by Congress, the FCC completed a report five months ago on retransmission consent. The March 9 letter suggests that the FCC's Report to Congress was sympathetic to the cable industry's concerns about retransmission consent, when in fact the Report commented that cable's arguments should not "be properly considered within the scope of our examination" (*SHVERA Report*, ¶ 34). That is *not* an endorsement. In fact, the FCC concluded that, "as a general rule, the local broadcaster and the MVPD [cable or satellite operator] negotiate in the context of a level playing field in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially is detrimental to each side" (*SHVERA Report*, ¶ 44). The FCC also expressly rejected cable's proposal to allow cable operators to bypass the local program exclusivity rights of stations if they could not reach agreement on retransmission consent with the local stations (*SHVERA Report*, ¶ 50). The Report went on strongly to oppose altering the retransmission consent regime unless the entire regulatory relationship between broadcasters and cable operators is re-examined and re-structured to ensure that the careful balance established by Congress in 1992 was not disrupted.

III

The March 9 letter contains other misstatements and distortions:

- The letter argues that retransmission consent leads to "higher consumer bills." But the continuing escalation of cable's prices to consumers has occurred when virtually no broadcaster received any retransmission consent payments. Continuing a long history of rate hikes far in excess of inflation, cable rates increased 7.8% in 2002 and 5.4% in 2003; and all of these increases were before the prospective cash deals that the cable industry seeks protection from in its March 9 letter. In fact, the FCC found in 2004 that cable operators have been able to charge their subscribers more than $14 per month for a "basic" tier that consists largely or entirely of broadcast signals. The impact of networks and some stations having sought carriage for co-owned cable programming services does not change this equation because studies consistently have shown that cable price increases always outpace programming costs. Programming, in fact, is a small proportion of cable's costs — only about 25 percent, according to February 2005 calculations from the FCC, figures that are backed up by recent, comprehensive studies by Morgan Stanley.

- A major cause for escalating cable rates has been the increasing consolidation of the cable industry. Studies by the Government Accountability Office, the FCC and the Consumer Federation of America all have found that consumer cable

prices are driven by lack of competition. GAO and FCC found that national consolidation and clustering have increased cable prices to consumers by more than 5 percent. (Many studies also show much lower cable rates where cable systems face terrestrial competition.) Moreover, strong over-the-air broadcast stations, particularly with new and diverse multicast programming streams, offer significant downward pressure on cable costs by providing additional competition. Now that cable is facing increasing competition, it is seeking to limit its costs and preserve its profit margins by demanding that the government thwart marketplace negotiations with broadcasters.

- The March 9 letter claims that broadcasters "derive enormous value from carriage," but ignores the fact that cable obtains enormous value from carrying broadcast signals. Despite having available scores and in some cases hundreds of channels, cable subscribers spend well over 40 percent of their time watching *broadcast* signals. Even more to the point, this dispute over the value of broadcast signals can and should be resolved in marketplace negotiations that the retransmission consent principle makes possible. But the parties to the March 9 letter prefer to be protected from having to negotiate with broadcasters for the fair value of their signals, while continuing to build their business on the backs of broadcasters.

- DirecTV and telephone companies entering the video marketplace are agreeing to make retransmission consent payments to broadcasters as fair compensation for carriage of their signals. Despite this, the parties to the March 9 letter claim that retransmission consent is not working. This claim is further belied by the fact *there has never been an adjudicated complaint at the FCC of any broadcaster refusing to negotiate in good faith under the retransmission consent principle*. In fact, the only party that ever has been adjudicated of bad-faith negotiation by the FCC is EchoStar — a signatory to the March 9 letter.

* * *

Congress properly decided in 1992 that broadcasters should be able to negotiate freely with their cable rivals for fair compensation for cable's carriage of their signals. In the decade following enactment of this legislation, cable systems were largely protected against the discipline of marketplace negotiations because of their monopolistic power. Now that satellite has emerged to create a MVPD duopoly and other potential competitors are appearing on the horizon, certain elements of the cable and satellite industries seek to be protected from the marketplace by efforts like their March 9 letter. Congress should not tumble to this thinly disguised effort to have the government put its thumb on cable's side of the scale.

Respectfully submitted,

DAVID K. REHR
President and CEO
National Association of Broadcasters

PRESTON R. PADDEN
Executive Vice President
The Walt Disney Company

MARTIN D. FRANKS
Executive Vice President
CBS Corporation

B. ROBERT OKUN
Vice President
NBC Universal

MICHAEL REGAN
Executive Vice President
News Corporation

LEON LONG
President
ABC Television Affiliates Association

DOREEN WADE
President
CBS Television Affiliates Association

TERRY MACKIN
President
The NBC Affiliates

BRIAN BRADY
President
FBC Television Affiliates Association



March 28, 2006

House Energy and Commerce Committee
U.S. House of Representatives
Washington, DC 20515

RE: OPPOSE THE DEAL AMENDMENT TO GUT THE CABLE ACT

Dear Representative:

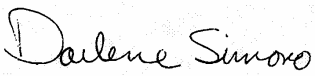
On behalf of the undersigned organizations below, we are writing to ask that you oppose the amendment sponsored by Congressman Deal to radically restructure the current retransmission consent system.

Retransmission consent negotiations are private, market-based negotiations between broadcasters and multichannel video programming distributors. Congress should not alter a system that has evolved to benefit consumers as well as broadcasters and cable companies.

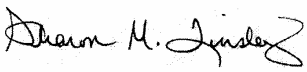
The FCC's most recent review of the retransmission consent structure led the Commission to recommend no changes to the current system, writing in its September 2005 report, "*Our review of the record does not lead us to recommend any changes to the retransmission consent regime at this time*."

On behalf of local television stations across the country, we urge you to reject Congressman Deal's proposal, which would gut Congress' intent in the Cable Act, turning back the clock to the bad old days when cable operators simply took broadcasters' signals and profited from them without ever compensating broadcasters.

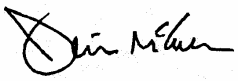
Sincerely,



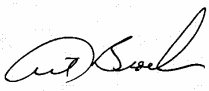
Darlene Simono
Executive Director
Alaska Broadcasters Association



Sharon M. Tinsley
Executive Director
Alabama Broadcasters Association



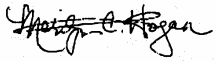
Jim McCall
Executive Director
Arkansas Broadcasters Association



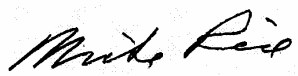
Art Brooks
President & CEO
Arizona Broadcasters Association



Stan Statham
President & CEO
California Broadcasters Association



Marilyn C. Hogan
President & CEO
Colorado Broadcasters Association



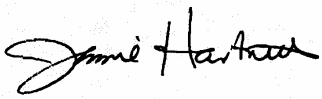
Mike Rice
President
Connecticut Broadcasters Association



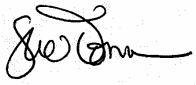
C. Patrick Roberts
President
Florida Association of Broadcasters



Jere Pigue
President
Georgia Association of Broadcasters



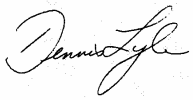
Jamie Hartnett
Executive Director
Hawaii Association of Broadcasters



Sue Toma
Executive Director
Iowa Broadcasters Association



Connie M. Searles
President
Idaho State Broadcasters Association



Dennis Lyle
President & CEO
Illinois Broadcasters Association



Suzanne Goucher
President
Maine Association of Broadcasters



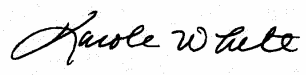
Linda Compton
President & CEO
Indiana Broadcasters Association



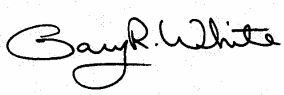
B. Allan Sprague
President
Massachusetts Broadcasters Association



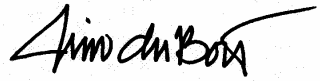
Harriet J. Lange
President
Kansas Association of Broadcasters



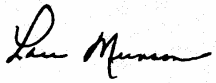
Karole White
President
Michigan Association of Broadcasters



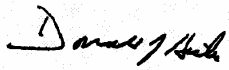
Gary R. White
President & CEO
Kentucky Broadcasters Association



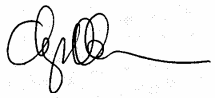
Jim du Bois
President & CEO
Minnesota Broadcasters Association



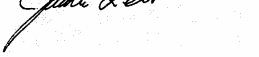
Lou Munson
President & CEO
Louisiana Association of Broadcasters



Don Hicks
President & CEO
Missouri Broadcasters Association



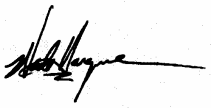
Chip Weinman
President
MD/D.C./DE Broadcasters Association



Jackie Lett
President
Mississippi Association of Broadcasters



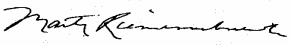
Greg MacDonald
President & CEO
Montana Broadcasters Association



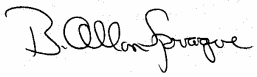
Wade Hargrove
Executive Director & General Counsel
North Carolina Association of Broadcasters



Beth A. Helfrich
President
North Dakota Broadcasters Association



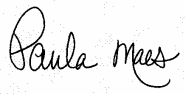
Marty Riemenschneider
President
Nebraska Broadcasters Association



B. Allan Sprague
President
New Hampshire Association of Broadcasters



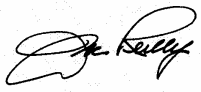
Phil Roberts
President
New Jersey Broadcasters Association



Paula Maes
President
New Mexico Broadcasters Association



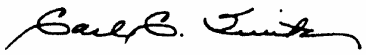
Robert D. Fisher
President & CEO
Nevada Broadcasters Association



Joe Reilly
President
New York State Broadcasters Association



Chris Merritt
Executive Director
Ohio Association of Broadcasters



Carl Smith
President & CEO
Oklahoma Association of Broadcasters



Bill Johnstone
President & CEO
Oregon Association of Broadcasters



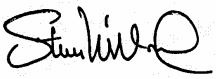
Rich Wyckoff
President
Pennsylvania Association of Broadcasters



Ron Wayland
President
Rhode Island Broadcasters Association



Shani White
Executive Director
South Carolina Broadcasters Association



Steve Willard
President
South Dakota Broadcasters Association



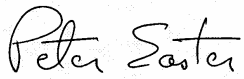
Whit Adamson
President
Tennessee Association of Broadcasters



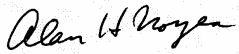
Ann Arnold
Executive Director
Texas Association of Broadcasters



Dale Zabriskie
President & CEO
Utah Broadcasters Association



Peter Easter
Execuitve Director
Virginia Association of Broadcasters



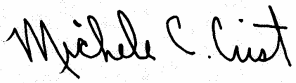
Alan H. Noyes
Execuitve Director
Vermont Association of Broadcasters



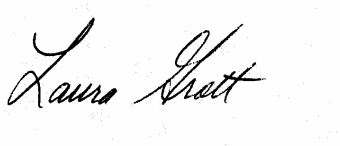
Mark Allen
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Washington State Association of Broadcasters



John Labbs
President
Wisconsin Broadcasters Association



Michele C. Crist
Executive Director
West Virginia Broadcasters Association



Laura Grott
President
Wyoming Association of Broadcasters

MR. WALDEN. Thank you, Mr. Fritz. We appreciate your comments. Mr. Citron, welcome. We look forward to your comments, sir.

MR. CITRON. Thank you, Mr. Chairman, and thank you for the opportunity to testify before your committee regarding your draft telecommunications legislation. I will focus my remarks on the provisions that relate to emergency services.

As policy makers, you should share our vision that every American have access to E-911 regardless of whether they are fixed, mobile, or voice over IP communications technology. Vonage has no higher priority than delivering enhanced 911 to our customers nationwide and your legislation would help accelerate that objective. To this end, we have partnered with the FCC and public safety community officials to enable more than one million Vonage lines with E-911. This represents over 70 percent of our customer base as we work diligently to enable every customer with this service. The Vonage networks complete nearly 1,000 successful E-911 calls every day. In addition to dedicating significant resources to our 911 effort, Vonage has also committed to the collection and remittance of statewide 911 fees to fund the build-out and upgrade of our nation's local public safety answering points.

Vonage's services are inherently nomadic, meaning that they are capable of operating over any broadband connection anywhere in the world. For example, when Katrina devastated the Gulf Coast, New Orleans officials received their first call from President Bush on a Vonage phone, and as thousands of patients were pouring into Baton Rouge General Hospital, Vonage was the only long-distance line available for doctors and emergency medical personnel to use. Our users can be in New Orleans one day and then the next day in Texas. This allows flexibility that fixed and mobile services just do not have. This form of mobility presents enormous possibilities but also poses unique challenges to an antiquated 911 system, which was built to be fixed and local. While we have retrofitted our service to be compatible with this 1960s-style network, we shouldn't limit our vision to the technology from the 1960s. Nine-one-one should be the headlights, not the taillights, of the communications industry.

The challenge to you as policy makers and regulators is to enable all Americans with E-911. We honor the countless hours members of this committee, particularly Chairman Barton, Ranking Member Dingell, Congressmen Upton, Pickering, Markey, and Gordon have spent working on achieving this goal, and we commend the FCC's endeavors in the scenario, but the FCC has done everything within its statutory authority and now it is time for Congress to act. Congress should mandate E-911 to all Americans regardless of whether it is fixed, mobile,

or voice over IP. Congress should provide liability parity for all providers of emergency services. Additionally, Congress should require access to underlying 911 facilities, and lastly, Congress should grant the FCC authority to create a forward path for the industry.

Chairman Barton's commitment to public safety and the FCC's E-911 rules have helped Vonage with the fastest deployment of nomadic 911 services in history. Despite the FCC's support and hard work over the last nine months, their powers are limited to grant VOIP providers the liability parity that public safety demands, nor can the agency grant access to critical telecommunications elements that providers use to offer E-911 to customers. Your legislation would help overcome the obstacles in gaining access to 911 facilities. Nomadic voice over IP providers like Vonage need access to all the 911 elements necessary to provide a comprehensive solution and the committee print addresses this concern. By including the 911 access provision in the legislation, you have ensured that the 911 system is held as a public trust, not abused as a competitive lever.

In addition to access challenges, liability issues continue to impede progress in several key areas of the country. Many 911 centers have refused to complete voice over IP emergency calls without the same liability protections that exist for wireline and wireless carriers. I underscore public safety's concerns about the lack of liability parity for voice over IP emergency calls and request that the committee include this going forward. We second the National Emergency Numbers Association's request that a provision for liability parity be added to the bill.

Finally, Congress should carefully contemplate a forward path towards building out a flexible, more technologically advanced 911 network while preserving innovation and competition. Further, it is good policy for lawmakers to guarantee that every American has access to E-911. Many Americans today still have no access to E-911 at all on the traditional wireline phone network. We humbly suggest, as part of going forward, review and oversight of our nation's communications system that the leaders on this committee extend the E-911 capabilities to cover every American with a phone.

I will conclude by noting that Vonage strongly supports the interconnection provisions in the committee's draft and would hope access to numbering resources would also be included. In short, Vonage supports this legislation and I want to thank the sponsors Chairman Barton, Congressmen Upton, Pickering, and Rush, as well as Representatives Shimkus, Eshoo, and Gordon for their leadership on 911 issues. We look forward to working with the committee towards its passage.

[The prepared statement of Jeffrey Citron follows:]

PREPARED STATEMENT OF JEFFREY CITRON, CHAIRMAN AND CHIEF STRATEGIST, VONAGE

Mr. Chairman, thank you for the opportunity to testify before your committee regarding your draft telecommunications legislation. I will focus my remarks on the provisions that relate to 911 services. Vonage has no higher priority than delivering Enhanced 911 to our customers nationwide, and this legislation would help accelerate that objective.

Vonage currently delivers Enhanced 911 to more than one million subscriber lines, covering 70% of our base—and we are working diligently to get this service to 100% of our customers immediately. We consider ourselves a partner with public safety, and have not only dedicated significant resources to our 911 effort, but have committed to paying 911 fees on a statewide basis throughout the country.

Chairman Martin's commitment to public safety and the FCC's E-911 rules have helped Vonage with the fastest deployment of nomadic 911 services in history. Working with our partners at the FCC and the public safety community, the Vonage network completes nearly a thousand successful 911 calls every day.

Despite this progress, significant challenges remain and your legislation would help overcome those obstacles. I want to make three points. First, nomadic VoIP providers like Vonage need access to all the 911 elements necessary to provide a comprehensive solution; the Committee print addresses this concern. Second, many 911 centers refuse to complete VoIP emergency calls without the same liability protections that exist for wireline and wireless carriers; this provision would need to be added to the bill. Third, Congress should carefully contemplate a forward path towards building out a flexible, more technologically advanced 911 network while preserving innovation and competition.

By including the 911 access provisions in this legislation, you have ensured that the 911 system is held as a public trust, not used as a competitive lever.

Next, I would underscore public safety's concerns about the lack of liability parity for VoIP emergency calls and request the Committee include this going forward. Unlike wireline and wireless carriers, VoIP providers do not have any liability protection for completing 911 calls. Unfortunately, there are instances today where 911 centers will not accept our emergency calls without such protection.

In 1999, this Committee and Congress passed the Wireless Public Safety Act, granting wireless carriers equivalent liability status to wireline services for 911 calls. We would simply ask that as this bill moves to the floor, the Committee consider extending identical liability provisions to VoIP providers and public safety centers.

Finally, I would like to comment on innovations in communications technology and how they interact with the nation's 911 system.

Vonage offers a product that is inherently nomadic—meaning it's capable of operating over any broadband connection, anywhere in the world. Our users can be in Texas one day and Tokyo the next. This allows flexibility that fixed services and traditional phone services do not.

For example, when Katrina devastated the Gulf Coast, New Orleans officials received their first call from President Bush on a Vonage phone. And as thousands of patients were coming into the Baton Rouge General Hospital, Vonage was the only long distance line available to doctors and emergency medical personnel.

This nomadic feature, which allows our service to work over any high-speed Internet connection anywhere, is the only reason these calls were able to get through.

This mobility also presents unique challenges to the 911 system which was built to be fixed and local. While we have retrofitted our service to be compatible with a 911

network based on 1968 technology, we shouldn't limit our vision to 1968. 911 should be the head lights, not the tail lights of communications.

I would like to be clear that we support the FCC's efforts to bring E-911 to VoIP services. We embrace this obligation, and Congress can help provide a forward path that is sensible for public safety and moves us towards next generation 911 infrastructure.

Current E-911 regulations apply to Vonage but not to many other VoIP providers. If E-911 services are not available to VoIP providers in some markets, consumers in those markets will still buy VoIP without E-911. Vonage may not be the provider for these customers, but another company will be, and the public safety community will be all the poorer for having countless Americans without E-911 service.

The challenge for this Congress is to enable Americans who want VoIP to get those services with E-911 everywhere.

I will conclude by noting that Vonage strongly supports the interconnection provision in the Committee's draft, and would hope access to numbers and number portability could be included with that provision.

In short, Vonage supports this legislation and I want to thank the sponsors—Chairman Barton, Congressmen Upton, Pickering, and Rush—as well as Representatives Shimkus, Eshoo, and Gordon for their leadership on 911 issues. We look forward to working with the Committee towards its passage.

MR. WALDEN. Thank you, Mr. Citron, and thank you to all of our panelists today. I am going to start off with a question for Mr. Fellman. Mr. Fellman, I heard pretty quickly from my cities and their mayors when the first versions of this bill came forward and they expressed concerns about control over their rights-of-way, about the franchise fees, about the PEG channels, and additional fees. From your perspective as a mayor, does this bill take care or satisfy the issues relative to the rights-of-way in your community's ability to control the rights-of-way?

MR. FELLMAN. Thank you, Mr. Chairman. Not completely. One of our biggest concerns is it that disputes over interpretation of what local governments might do go to the FCC. I will tell you that that in and of itself will probably be cost-prohibitive to the point of precluding many, especially small and medium-sized communities, from ever holding firm to their position of what it means to enforce local rights-of-way. Presently we go to local court if there is a dispute, whether it is a telecommunications company, a contractor of another kind, a utility company like gas or electric. Those issues are dealt with in local courts. The FCC should not be made the rights-of-way judge and jury for local governments in this Nation.

MR. WALDEN. All right. The franchise fee issue, it is five percent, up to five percent gross revenues plus one percent and some guarantee on PEG channels. Now, I know that is not everything every city wants but what on average do cities get today in terms of franchise fees? What percent of gross revenues?

MR. FELLMAN. In my experience, the majority of local franchising authorities get five percent of gross revenues. Now, gross revenues is

defined differently in different areas so it is five percent of what piece of the pie.

MR. WALDEN. Sure, and the you get nothing from satellite providers, correct?

MR. FELLMAN. That is correct.

MR. WALDEN. Now, if we open up the market with technology expanding, it is perhaps likely that some of these folks who would come into our cities offering video services for the first time might take market share away from, say, satellite, correct? And so your cities might actually get additional revenue. It is conceivable, at least, that there would be additional providers in your communities providing service for which you would get revenue, correct?

MR. FELLMAN. That is theoretically possible, yes.

MR. WALDEN. All right. Okay. Mr. Misener, I want to go to you on net neutrality issues and perhaps get some feedback from Mr. McSlarrow and Mr. McCormick regarding this issue about the pipe and whether or not the providers, like Mr. Misener is representing, are going to get sidetracked in this information age. I know it is a very complex and controversial issue. I would like to get your response to his comments and then maybe his response to your comments. You heard his testimony, Mr. McSlarrow.

MR. MCSLARROW. I think the one issue we can set aside is whether or not net neutrality means something about whether or not people are going to get access blocked. I think we can set that aside. That hasn't happened and it really has been a red herring. We are now engaged in a much more complex conversation about what the future of the network architecture looks like. I think our fundamental position is not that there isn't good faith behind concerns expressed. It is that it does not reflect the reality of the world we live in. Four years ago, people made these same arguments and in that time, Google has grown to $100 billion market cap. The providers like Amazon.com and Google are flourishing. So in the absence of an identifiable problem, recognizing the networks that are in place today, that will ultimately be upgraded and who knows what the architecture looks like will cost vast sums of money and investment. Why would we risk freezing innovation and investment in place today?

MR. WALDEN. All right. I am going to run out of time. Mr. Misener, very quickly.

MR. MISENER. Yes. Thank you, Mr. Chairman. Mr. McSlarrow said earlier today that this would be regulating the Internet for the first time, and I think this is probably one of the most fundamental misconceptions here. The Internet has been regulated in the sense of non-discrimination since its inception until last year, and so the fact that

bad things haven't happened yet is largely as a result of regulation that was in place, and that has recently been removed by the FCC. Furthermore, a couple of the telcos are under merger restrictions that actually prevent them from, at least for the next 18 months, engaging in this kind of activity. Lastly, I think it is a big misconception. Mr. McCormick has said that they will not block, impair, or degrade content. Well, they also say simultaneously that they want to provide quality of service for a fee. These are fundamentally inconsistent statements. It is impossible to provide quality of service for a fee without degrading some content.

MR. WALDEN. All right. My time has expired. Mr. Markey.

MR. MARKEY. Thank you. Mr. McSlarrow, following up on this line of questioning, whether or not this point made by Mr. Walden is a red herring or not, I was dismayed to read recently that cable operators are refusing ads from AT&T and Verizon about video choice. In the Washington Post, it quotes a Time Warner spokesman as saying Coke doesn't promote Pepsi; McDonald's doesn't promote Burger King; NBC doesn't promote ABC. Now, Mr. McCormick, the article also states that AT&T has filed a complaint with the FCC on this matter. Now, Mr. McCormick, what if the cable guys were told they had to accept the ads but they then aired them on the least watched channel at 3:00 a.m. in the morning? Would that be acceptable to you? In other words, they are not blocking the ad, they are just burying it. So I find it more than a little ironic that you guys are fighting over something akin to what you claim you won't do to Internet companies with respect to broadband services. You are having that fight right now.

So let us go over to you, Mr. Citron. You are an Internet-based entrepreneur. You are akin to Pepsi to their collective Coke. Are you reassured by the network neutrality section of this bill or do you think we need clear anti-discriminatory rules?

MR. CITRON. Sir, I think the bill makes a first good attempt at providing a framework to move forward, and I commend everyone's efforts towards that.

MR. MARKEY. Are you satisfied, Mr. Citron?

MR. CITRON. I think there is more that we can do to protect consumers to ensure that they make--

MR. MARKEY. On a scale to ten, how far have they gone?

MR. CITRON. They are on the right path but not there yet.

MR. MARKEY. Where do you put it on a scale to ten?

MR. CITRON. Oh, probably somewhere about midway along the way.

MR. MARKEY. Around what?

MR. CITRON. They are probably at the midpoint.

MR. MARKEY. Mr. Misener, you are here representing Google, eBay, Amazon, all the companies that are leading edge of revolutionizing our economy. Would you be satisfied if there were non-opposable standards to protect your companies and thousands of others?

MR. MISENER. Absolutely not. I think frankly if you were to give me the one to ten scale, I would give it about a negative three, and the reason it is negative is it actually takes away authority from the FCC. It seems to give regulatory authority to the Commission when, in fact, the Commission already has the authority, but it actually takes away the rulemaking and some of the enforcement powers that the Commission currently has. So frankly, in many respects, it is a step backwards.

MR. MARKEY. I thank you, Mr. Misener. Now, so we already see the problem over here and these are the giants fighting, not some kid in a garage that is going to be seeking extra access.

Now, Mr. McCormick, you want a deregulatory environment--I applaud you for that--for video services. You want to get out there and you want to get the Government out of the way so that the phone companies and the cable industry can just go at it in the free market and so I assume that that means you will be supporting my amendment to eliminate program access rights for national cable franchises for the telephone industry, because why should the cable industry have to give you their programming, their HBOs, their CNNs in the market. They made the investments. Why should the Government force them to share it with you, Mr. McCormick? Why should the Government make--why are you asking us to force the cable industry to share their programming with you?

MR. MCCORMICK. I think the issue, Mr. Markey, is this committee has long taken an interest in new entrants.

MR. MARKEY. Well, I agree with that but again, we are talking about new entrants for net neutrality, okay?

MR. MCCORMICK. I understand.

MR. MARKEY. And that is an interest you don't seem to really share with us, so what I am saying is, I am going to move back the other way and say you guys should develop your own programming.

MR. MCCORMICK. No, no. I think that what we have said with regard to net neutrality is that we will not block, impair, or degrade, that we will provide full access to our networks. We want to have the same thing with regard to--

MR. MARKEY. Do you want program access principles or program access rules, because I am going to change it to principles and then leave it to the FCC to enforce. Is that acceptable to you?

MR. MCCORMICK. Well, if the FCC said that it has the ability to enforce any problems that would arise--

MR. MARKEY. No, what I am saying is, I am going to change the program access rules to principles and then you will have to go to the FCC and get them to enforce the principles. Would that be acceptable to you?

MR. MCCORMICK. Well--

MR. MARKEY. Yes or no, Mr. McCormick. Yes or no.

MR. MCCORMICK. We think that the existing law with regard to programming--

MR. MARKEY. You want rules. You want to be protected by rules. Mr. McSlarrow, can you pledge today that cable operators who obtain national licenses under the bill will not withdraw service from any geographic area they are currently serving?

MR. MCSLARROW. No.

MR. MARKEY. Can you pledge that service and technology upgrades will occur uniformly as they do under local franchising agreements when operators get national licenses?

MR. MCSLARROW. No.

MR. MARKEY. Can you pledge today that cable operators won't cross-subsidize lower rates to consumers in the part of town where the Bell company has shown up with higher rates in the part of town where the Bells have chosen not compete in?

MR. MCSLARROW. No.

MR. MARKEY. Mr. McSlarrow, the final question, the remedy to this is making sure that Mr. McCormick's companies compete over the same service area that you compete over, then the marketplace will force consumer-friendly activity, not just on the rich side of town but on the poor side of town, because otherwise my fear is, and I think it is going to happen, is that the poor side of town is going to wind up subsidizing the rich side of town where the competition is going to break out. You don't need a business degree from Harvard Business School to know that that is the plan. Thank you, Mr. Chairman.

MR. UPTON. Thank you. Sorry that I had to step away for a few minutes. I appreciate that your testimony was submitted in advance so I could look at it last night.

Mayor Fellman, I appreciate your recognition in your testimony that, "this draft is more responsive to those issues you raised with the committee in the past and your willingness to continue to work with the committee going forward." I thank you for that and I look forward to those discussions.

In your testimony you suggested that the existing franchise process is not a barrier to entry. However, according to the Verizon February 13, 2006, filing with the FCC, during 2005 Verizon conducted franchise negotiations with approximately 320 LFAs. Verizon only obtained 44

franchises as of year end 2005 and it obtained seven additional franchises at the time of their filing. Of those 51 total franchises, 29 were in Texas and most of those were obtained after the new statewide franchise law was enacted. Excluding the ones from Texas, it has often taken Verizon between six and 12 months and sometimes more to obtain the franchises that it has been awarded. Verizon estimates that it will need between 2,000 and 3,500 franchises, all told and that obviously is just them.

We know that there are other phone companies seeking to offer new video services. We also know that there are approximately 33,000 local franchises across the country. I want to read some excerpts from some interesting commentary regarding the existing local franchise process, and I quote: "Rapid technological advancements of our day require changes to be made to the current regulatory environment with regard to video service providers. The current regulatory barriers have not kept up with the latest technology, and have the effect of slowing down or preventing the American consumer from either enjoying new technologies or receiving a better price on existing services which would result from the increased marketplace competition. The current franchise system inhibits additional companies who might be subject to it from entering the marketplace and investing in infrastructure when they are challenged by the expense and difficulty of attaining enough market share to recoup costs. The effect of all this in trying to apply a 20-plus-year-old business model on today's technologies cities is denying their consumers choice, unnecessarily raising the cost of such services, and stifling innovation. Competition has been stifled in the world of video services due to government regulation."

Now, my question is a multiple choice. Who do you think made that statement? Do you think it was a CEO of a Bell, cable company, Progress and Freedom Foundation, or a mayor of a large town in California? I think you know: D, the mayor. The mayor of the city of Anaheim, a city of 345,000 folks, 47 percent Latino, 36 percent white, 12 percent Asian, two percent black with 73 percent of its population having an income less than $75,000, and those excerpts are directly from the reply comments which the mayor filed with the FCC in its ongoing review of the local franchise process, and I will put that entire part of that into the record.

My point in raising this is to suggest that it is not just Chairman Barton, Mr. Rush, Mr. Pickering, myself, and others sitting here in D.C. who believe that the local franchise process is standing in the way of competition for the consumer. At least the mayor of an ethnically and income-diverse city in California appears to concur as well. And as I said in my opening statement, the bill balances the need, I think, for reforming the franchise process while preserving, in the national

franchise, critical important elements of the legacy local franchise framework, namely the control over right-of-way, which we had conferred with before with the cities, the franchise fee of up to five percent of the gross with an additional one percent for the carriage of PEG, something that I support, and as well on top of the five percent franchise fee. I look forward to your input and your comments as this process unfolds, and I don't know if you would like to comment on what we tried to get the mayor to come today and sit next to you but it didn't happen.

[The information follows:]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Implementation of Section 621(a)(1) of	)	
the Cable Communications Policy Act of 1984	)	MB Docket No. 05-311
as amended by the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	

REPLY COMMENTS OF THE CITY OF ANAHEIM

These Comments are filed by City of Anaheim. As the Federal Communications Commission (FCC) reviews implementation of the Federal Communications Act, we are confident the Commission will hear from many cities as well as associations representing municipalities. No doubt, many of these entities will appeal to the FCC to maintain the status quo. We believe you will find Anaheim's comments different from most municipalities.

Anaheim believes that the rapid technological advancements of our day require changes to be made to the current regulatory environment with regard to video service providers. The current regulatory barriers have not kept up with the latest technology, and have the effect of slowing down or preventing the American consumer from either enjoying new technologies or receiving a better price on existing services which would result from the increased marketplace competition. Anaheim has set out a broader policy of dismantling outdated barriers to greater consumer choice, with the goal of eliminating franchise fees on these services as a relic of the past. In support of this belief, we wish to inform the Commission about the status of video franchising in our community and discuss why federal reform is needed.

Community Information

Anaheim is a city with a population of 345,317. Since 1979, the city of Anaheim has had a franchise agreement with various cable service providers, the most recent of which is with Adelphia Communications, and which in turn is being transferred to Time-Warner Communications.

In order to increase competition and provider greater options to our residents, the City recently reached an agreement with AT&T for the delivery of Internet Protocol Television (IPTV) to Anaheim residents. We believe this agreement is a model that shows the kind of local flexibility that an updated regulatory climate would further foster.

As you would expect, AT&T agreed to offset the city's cost of impact on local infrastructure. They do not escape any obligation to work with us scheduling or paying for the impact on streets as network enhancements are made under our roads. However, AT&T will not be required to pay the city a franchise fee, nor will the company be promised, either in writing on in effect, an exclusive right to provide Anaheim residents with IPTV.

The agreement between AT&T and Anaheim currently includes provisions to: (1) reimburse Anaheim for any direct costs associated with the project; (2) provide continued access to Channel 3, our local Public/Education/Government (PEG) channel; and (3) maintain consistency with the City's aesthetics, standards and procedures. This agreement is consistent with our overall policy described earlier.

Introduction and Summary

The City of Anaheim has expressed its commitment to provide innovative and robust communication options to its residents and businesses and to foster competition and capabilities, all without cost or liability to the City. City leaders do not believe that government should determine whether residents receive video content through established cable providers, growing competition from satellite television, or new concepts coming on line like internet protocol television (IPTV), or technologies on the horizon like Wi-Fi delivery of video content. Anaheim is supportive of maintaining open market competition in which any franchise fee is eliminated for consumers and a variety of service providers have an opportunity to earn customer support.

The current franchise system inhibits additional companies who might be subject to it from entering the marketplace and investing in infrastructure when they are challenged by the expense and difficulty of attaining enough market share to recoup costs. At the same time, companies that are clearly exempt from franchising, like satellite providers, flourish.

Franchise fees and many elements within franchise agreements, therefore, are merely an artificial intrusion by government into the consumer marketplace. Attempts to apply franchise fees and agreements to some providers, while exempting others, effectively eschews the market. Therefore, eliminating these fees and impediments, Anaheim contends, will allow equitable competition amongst the variety of video service providers. In this way, and without local government interference, the various systems compete in price, quality and quantity and consumers decide which service provider they prefer.

It is perhaps most instructive to examine the arguments made by supporters of the status quo and the reasons why these arguments are not valid, in Anaheim's experience.

ARGUMENT 1: "LOCAL GOVERNMENTS NEED PROTECTION FROM FISCAL HARM"

Many cities argue, essentially, that because they have gotten used to the revenue from franchise fees, they should be entitled to continue to receive them forever more, whether the original justification for the fee still makes sense. Historically, cities and cable providers have had a mutual interest in franchise agreements. Cities wanted systems built out to their whole territory, and the cable provider wanted protection of the investment they made for citywide deployment in order to have time to recoup their costs.

However, technology has passed these days by. Some video providers, by the nature of their technology, can bypass these outmoded models. For other potential providers,

the ability to provide video entertainment content over their systems is a byproduct of upgrades they plan to make to their systems whereby they may provide other data services to potential customers. And, if they foreswore the ability to provide video entertainment (which would only hurt consumers) over their systems, municipalities would not have the ability to impose franchises.

The effect of all this in trying to apply a twenty-plus year old business model on today's technologies, cities are denying their consumers choice, unnecessarily raising the costs of such services, and stifling innovation.

In the past, local governments have been accustomed to using money brought in from the franchise fee to help pay for basic city services, such as public safety, traffic management and street and sidewalk preservation. But, in fact, cities have created an unfair tax on cable companies and limited competition in a fast-paced, competitive marketplace. Furthermore, many cities have used these fees to fund essential municipal services unrelated to cable, although the fees simply are not a long-term stable source of revenue for cities. As an example, just look at the emergence of satellite services. This, a non-taxed cable competitor, has increasingly taken a significant share of the entertainment market. As cable companies have lost customers to other competing entities, cities have seen a corresponding drop in the revenues that come from cable franchise fees. It is a weak fiscal model that subjects core municipal services such as public safety on a dwindling source of revenue, regulated by sources out of direct control of that municipality.

We question why new companies that can provide alternative video services to their residents outside the original intent of franchising should have to pay a franchise fee? If a company that wishes to do business in Anaheim does need to access government-owned land (for example, to upgrade networks under city roads, streets and other right-of-way), we already have the rights and protections to ensure that the company offsets any costs associated with the use (as we have done with AT&T's IPTV service agreement).

ARGUMENT 2: " LOCAL GOVERNMENTS NEED TO PROTECT THEIR CONTROL OF RIGHTS-OF-WAY"

Some local government officials want the federal government to protect their right to charge impact fees and rent for the use of public right-of-ways. That is well and good, but the concept of a franchise agreement is not necessary for a city to maintain control of their infrastructure.

In Anaheim's agreement with AT&T, they complied with existing state law, and with our local requests, for control over our right of way. They are to schedule any such digging up and replacement of right of way with us, and pay for the full cost, all without a franchise agreement.

If a company needs to use public-owned land for their service delivery infrastructure, it makes sense for the local government to negotiate a fee for the use of that property. However, local governments shouldn't have the power to prevent, effectively, other companies from entering in the marketplace. By the same token, if a private company wants to give away phone service in exchange for the use of publicly owned infrastructure, that shouldn't be prohibited. But local governments shouldn't be allowed to demand that a single company provide an array of free services in exchange for an effective monopolistic franchise, all the while preventing other companies from providing competitive service for their residents.

If a local government rents property or grants the use of a right-of-way, it is logical that representatives would ask for compensation as part of contract negotiations. Alternatively, city leaders can decide that they don't need to charge any fees for use, as the City of Anaheim did with our recent agreement with Earthlink, our Wi-Fi provider. Earthlink will be installing a Wi-Fi network throughout Anaheim, using city-owned

streetlights and other infrastructure. The city is not charging a franchise fee, but Earthlink is not guaranteed a monopoly on wireless service in Anaheim. They simply contracted with the city to install a citywide system because our city council wanted to be sure that our residents could enjoy the benefits of wireless communication throughout our community.

In their responsibility as city leaders, local government representatives have an obligation to manage their city's rights of way in order to achieve the best benefit to residents and maximize public value. In addition, local governments are responsible for providing access to rights of way within their control in a fair and even-handed manner. In so doing, governments ensure that existing users of the rights of way are not unduly inconvenienced. We believe that when public rights of ways are responsibly managed, residents receive the best possible benefit, which includes receiving the most up-to-date technology with the greatest variety of choice. All of these goals can be achieved without strict franchising.

ARGUMENT 3: "LOCAL GOVERNMENTS NEED THE AUTHORITY OF FRANCHISE AGREEMENTS"

It has been argued that cities need the power of franchise agreements in order to provide education and government access channels, local emergency alerts and other public services. Some believe that private companies should be required to give free services for police and fire stations, schools and libraries in exchange for doing business with and in their city. But we don't believe that free services like these justifies allowing a single company to have a *de facto* monopoly on the market. Again with our IPTV agreement, we were able to request of AT&T that they carry our local Channel 3 (PEG), which they happily agreed to, without a franchise.

Conclusions

In the 21st century, technology is changing on nearly a day-to-day basis. To the extent that government needs to be involved in the marketplace in order to be responsible stewards of the public interest, government leaders at all levels should be working to create a regulatory environment that can nimbly respond to market changes that result from some new exciting technological breakthrough. In the past, competition has been stifled in the world of video services due to government regulations.

The City of Anaheim respectfully requests that the FCC implement reforms that allow the American consumer to benefit from increased competition in the marketplace, enjoying new delivery methods and potentially lower costs for those services. We invite the commissioners to visit our city and see a local community that is able to deliver top-quality video service without a franchise fee, giving its residents real choice in the marketplace.

Respectfully submitted,

City of Anaheim

By: Mayor Curt Pringle
200 S. Anaheim Blvd., #733
Anaheim, CA 92805

cc: John Norton
Andrew Long

MR. FELLMAN. Well, I am sorry he wasn't able to come, but-

MR. UPTON. Just hit your--

MR. FELLMAN. It is on. Mr. Chairman, thank you. If I could respond briefly to just generally two of the points that you made, Verizon and Anaheim.

Here is what you didn't mention that was part of Verizon's comments. In that same FCC proceeding, Verizon indicated that its dedication to getting franchises was demonstrated by the fact that it had 50 employees dedicated to getting franchises throughout this country--50. Now, if you added up the number of lobbyists that Verizon has in every State where it was trying to end franchising and in this Congress, I would venture to say it is a few more than 50, and if they were dedicating appropriate resources to getting franchises, they would be deployed in half the places they are complaining about not having franchises now, and as a specific example, over four months ago Verizon went to the city of Bellevue, Washington, and said we want to get permits to start putting in our fiber network and do our upgrade, and the city of Bellevue, Washington, said let us start your franchise negotiations now because we want to be able to have those video services, we want you to be ready to be deployed when you are done putting in your upgrades. They said no, we are not ready to do that yet, and in the FCC filing that I made on behalf of a number of my clients, because outside of my service as mayor I do work for local governments in communications issues, there is documentation, the correspondence between Bellevue and Verizon, showing that the city is asking, can we start this franchise negotiation and Verizon saying no, we are not ready yet.

So I think there is another side of the story about how much some of these telephone companies are really interested in pursuing franchises. I think with respect to my colleague in Anaheim, Mr. Chairman, what works in Anaheim doesn't necessarily work in Arvada or New York or Detroit or any other city in the country, and that is why localism is important. If Mayor Pringle thinks that franchising is a bad thing in Anaheim, then God bless him. Let them do it that way in Anaheim and maybe it will work for his citizens, maybe it won't, but he is accountable to his constituents and his city council is accountable to his constituents by what they do in Anaheim just as I am accountable to mine, and Congress should not impose on local governments that accountability that we have to stand for.

MR. UPTON. I appreciate your comments. I yield for questions to Mr. Boucher.

MR. BOUCHER. Thank you, Mr. Chairman, and I want to extend my thanks also to the members of this panel for your participation in our deliberations today. We appreciate your comments. Mayor Fellman, let

me pick up with you. There is a provision of the bill which I was pleased to note that says that municipalities may not be prohibited by the States in which they reside from offering commercial telecommunications services for their residents. I am sure you have examined that provision. It is fairly succinct. Do you find it to be sufficient?

MR. FELLMAN. Yes, I do.

MR. BOUCHER. And you are not recommending any changes to that provision to this committee?

MR. FELLMAN. Again, it is a short provision and we have just seen the bill for a few days as many as you have. I don't know if we might suggest tweaking it a little bit but the concept of Congress saying that local government should have the right to provide these services if they decide at the local level that that is what their citizens--

MR. BOUCHER. And the bill does carry forward that permissible--

MR. FELLMAN. I read it that way, yes.

MR. BOUCHER. Good. Mr. Regan, would you like to comment on that? I know your company strongly supports the opportunity for local governments to be involved in these endeavors.

MR. REGAN. Yes, sir, Mr. Boucher. The municipalities were clearly the leaders and early adopters to our technology. Frankly, the fact that they have been blocked by the courts has really troubled us so our reading of that statute is, it does correct the situation and that municipalities, if that is enacted, will be able to enter back into the market. Thank you.

MR. BOUCHER. Thank you very much. Well, hopefully with that ringing endorsement from two sources, we can put this issue to bed. Mr. Misener, let me turn to you. I would welcome your comment on something that concerns me very much, and I made reference to this in my opening statement, and that is, the new business plan that has been announced by some last-mile providers that essentially would create something new on the Internet, and that is two lanes over the last mile, one fast, one slow. Access to the fast lane would be provided to content originators, the Internet-based companies operating out on the edge of the network, who could afford to pay for that access, and then everyone else would be relegated to the Internet slow lane. My concern is that this kind of structure, which is dramatically different from the way the Internet grew up, will have a significant adverse effect on innovation because the startup company won't have the money to pay those last-mile fast-lane fees. Is this a valid concern?

MR. MISENER. Yes, sir, Mr. Boucher, it is. I have spoken about this on other occasions and I have had folks from the network operators come up and say well, it is kind of a scary thing when a big company like yours is purporting to talk on behalf of small innovators. Two thoughts.

One is, it doesn't change the underlying truth. The small innovators won't be able to afford the paid police escort to get the prioritization and, therefore, they won't be able to serve consumers in the same way the big companies are. Second, it wasn't long ago that we were a small company. Just a decade ago we were a small, little innovative company, and if you count profitability, it was even less long ago that we were small. Lastly, our companies also operate innovative new services. We want to be able to develop new services for our customers and we want to be in a position to offer those without having to get permission from the network operators, so it really will affect innovation at the edge.

MR. BOUCHER. All right. Thank you very much. What I see as a simple solution for this is a basic provision that says that if prioritization is necessary, if fast-lane treatment is required in order to deliver video effectively or some other high data rate application like gaming perhaps effectively, then that is fine. That prioritization could take place. However, if the last-mile provider is going to prioritize bits of any kind, it should offer that same prioritized access for bits of a similar kind that originate from some unaffiliated content provider. That is a simple solution. Does that solution make sense? Would that effectively address the problem?

MR. MISENER. Yes, it would for content as it transits the network operator's network. In many respects, many video kinds of services, high bandwidth services require local injection. That is to say, instead of traversing the entire Internet, it behooves the service providers to inject it locally. We are not asking for that for free. To be very clear, we are willing to pay for that, but on reasonable and non-discriminatory terms that don't favor the network operator's preferred to affiliated content provider.

MR. BOUCHER. All right. Thank you very much. Let me simply ask Mr. McCormick if he wants to take a moment to respond. I know your companies have a somewhat different view.

MR. MCCORMICK. Yes, thank you, Congressman. Congressman Boucher, we have said that our companies will not block, impair, or degrade access to the Internet. We will not alter, modify, or change the data that consumers want. We have a hundred-year history of delivering you where you want to go. If you want to call Macy's, we--

MR. BOUCHER. Mr. McCormick, we understand that, and that is really not the issue. The issue is something that is very new and different that would not involve blocking or degrading. It would simply be creating two lanes of access, charging for one, leaving the slow lane for everyone who can't afford those fees, and the concern is really what that kind of structure would do to innovation.

MR. MCCORMICK. Well, let me respond specifically to that because, yes, I think the CEOs of each of our companies have responded in a very thoughtful, candid, and forthcoming way to those concerns. Most recently, yesterday there was an article by Mr. Notabart in the Wall Street Journal. I think the answer is this. Companies like Amazon, Google and others, consumers will continue to access those Web sites the way that they always have, but similarly, we have a history in this country where companies, governments municipal governments, Federal government, banks, health care facilities come to us and they ask for us to construct for them using Internet protocol, networks that are secure that can maintain privacy, particularly with regard to healthcare data and financial data. These networks ride over the same Internet links as do the Google and the Amazon access, and those networks are called virtual private networks. We provide them today, we will provide them in the future, and if a company like Netflix or Disney wants to come and say will you construct for us a virtual private network that will be secure, that will have certain quality assurances, that will have privacy, just as we do that today, we should be free to do that in the future--

MR. BOUCHER. And the effect on innovation. This really is the question. How do you respond to the concern that the startup won't be able to afford that prioritized service and therefore can't compete?

MR. MCCORMICK. Well, the answer to that question is this, that if we are talking about the startups along the lines of when Amazon was a startup or Google was a startup where consumers need to have access to those sites, there will be no blocking or impairing of that.

MR. BOUCHER. Mr. Chairman, I thank the gentleman and I yield back my time. Thank you.

MR. UPTON. Mr. Barton.

CHAIRMAN BARTON. I thank you, Mr. Chairman. I thank you for holding the hearing. I thank our witnesses for being here. This end of the panel has kind of been left out of these questions so far, so I am going to start with our friend from Vonage. I want just a concise verbal definition, and then I want you to let your lawyers work on it and send it to us in writing. I want a definition of net neutrality from each of you gentlemen, and I wish I could put cotton in your ears so you couldn't hear everybody else, but let us start with you, Mr. Citron. What is your definition of net neutrality?

MR. CITRON. I think the hallmark of net neutrality is about consumer protection. It is the consumer's right to bring any device they want to the network, it is the consumer's right to get any access to any lawful content that exists on the network, the consumer's right that should there be two lanes and it should be consumers who choose which lane they get to go ride in, not some other operator's right to go ahead

and decide for them. Those would be the hallmarks of net neutrality and the final point being that not one service, not one BIT should be treated favorably at the penalty or expense of another one.

CHAIRMAN BARTON. Mr. Fritz, I know NAB has just stayed up nights worrying about net neutrality.

MR. FRITZ. Fortunately, we have no position and no definition.

CHAIRMAN BARTON. Okay. Mr. Keefe?

MR. KEEFE. Same for me, Congressman. We are, you know, studying the issues and don't have a position yet. I mean, we don't practice any blocking in our company. I can tell you that.

CHAIRMAN BARTON. No, I just want a definition. I am not alleging wrongdoing. I just want to see if we can get a definition. I know Mr. Misener has got a definition.

MR. MISENER. Yes, sir. I think fundamentally it is preventing the extension of market power over the network to market power over content. I have tried to be super specific on the things that they are planning and how we would get at them and legislation so we could narrowly tailor it, but at base it is taking the market power that they have got over the network and extending it to market power over content, in a way that has never been possible before, because of law, regulation and frankly because of technology. That has changed.

CHAIRMAN BARTON. All right. Mr. Regan?

MR. REGAN. You got a minute?

CHAIRMAN BARTON. I got about 30 seconds.

MR. REGAN. Our points are all consumer related. Basically bottom line is, consumers ought to be able to get access to the bandwidth they buy. They ought to be able to run the applications that they choose to run within the constraints of the plan they buy. They ought to be able to attach devices to their Internet connection that don't cause harm to the network, and they ought to be able to go on the Internet where they want to go within the bounds of their service plan.

CHAIRMAN BARTON. All right. Mr. McSlarrow--notice nobody has given anywhere close to the same definition yet. Just an editorial comment.

MR. MCSLARROW. Mr. Chairman, I guess my definition is that it is the first time regulation of the Internet will freeze investment and innovation.

CHAIRMAN BARTON. That is your definition?

MR. MCSLARROW. That is my definition.

CHAIRMAN BARTON. Okay.

MR. MCSLARROW. Otherwise I will have to turn to lawyers.

CHAIRMAN BARTON. Mr. McCormick?

MR. MCCORMICK. Mr. Chairman, I would agree. We are dealing with what-if questions and hypotheticals, so I don't have an effective definition of what is meant by--

CHAIRMAN BARTON. Well, that is an honest answer, and our friend, the mayor.

MR. FELLMAN. Mr. Chairman, the associations that I am representing have not come up with their own definition and some have not even taken a position on net neutrality, but my personal feeling, and in an effort to allow you to say that at least some of us are in agreement is, I tend to agree with Mr. Citron.

CHAIRMAN BARTON. All right. Now, I want the members of the committee to notice, we got one, two, three, four, five, six, seven, eight gentlemen that represent some of the largest trade groups and some of the brightest minds in the country, and not one of them really gave a-- Mr. Misener probably came closer than anybody. I would have to give him the best grade. Mr. McSlarrow gave a very negative kind of anti-definition, and we are tried up in knots in this bill potentially over something that we don't even yet have a universally recognized definition of what it is.

Now, the bill before us definitely gives the FCC the authority to enforce net neutrality, whatever it is. If anybody violates the principles that the FCC has put out on net neutrality, whoever that villain is, the bill explicitly gives the FCC the authority, on a case-by-case basis, to punish the villain. Now, since we don't even know what it is, I think that is a pretty good start. Now, I understand the concerns and all that, but I think the committee print is headed in the right direction on net neutrality. I next want to ask Mr. McSlarrow under current law, are cable operators subject to price regulation in any locality that they serve?

MR. MCSLARROW. Yes, under current law, what is called a uniform price requirement throughout an entire franchise area for the basic package, so the 10 or 12 channels, not the full-blown expanded basic but for the basic package is in place until that market is deemed subject to, quote, unquote, "effective competition." That happens in two instances under current law, satellite companies reach 30 percent market penetration or upon entry of a telephone company.

CHAIRMAN BARTON. But you get to set your price. You can set it. It has to be the same for everybody in the territory that you are serving. Is that correct?

MR. MCSLARROW. For the basic package, it is still a regulated rate.

CHAIRMAN BARTON. And who--

MR. MCSLARROW. Congress deregulated the--

CHAIRMAN BARTON. Who regulates that rate?

MR. MCSLARROW. The localities under a formula I think derived from the FCC, but it is delegated to them.

CHAIRMAN BARTON. Okay. Well, my time is expired, Mr. Chairman. I have about five other questions. I do want a written definition from each of you on net neutrality, if your trade group doesn't have a dog in the hunt, just send us a letter that says we don't have a dog in the hunt and we won't worry with you.

MR. UPTON. Mr. Stupak.

MR. STUPAK. Thank you, Mr. Chairman. Before I start my questions, I would like to thank Chairman Barton and Chairman Upton for respecting the process and holding a hearing on this proposed legislation. Earlier this month, I and other members of the subcommittee had urged the committee to hold a hearing on the bill which if enacted would fundamentally alter our cable laws. I would also like to commend the authors for including sections on interconnection, municipal broadband, and ensuring that VOIP customers have access to 911. Earlier this year the Congressional Rural Caucus Telecommunications Task Force, which I co-chair, re-released our telecommunications rewrite principles. These principles included USF reform, intercarrier compensation, interconnection, and advanced access to broadband in rural areas to preserve strong phone service and promote strong broadband service. Mr. McCormick, I am pleased that you included USF and intercarrier compensation in your testimony. How important is it that Congress act on these issues this year?

MR. MCCORMICK. It is very important, Mr. Stupak, and we are hopeful that the committee will turn to those issues once it moves forward on the video choice legislation, as the Chairman has assured us that the committee will

MR. STUPAK. Thanks. On interconnection, it is crucial to preserving both competition in the voice market and affordable phone service in rural areas. That is why the rural caucus included in our principles for telecommunications reform the requirement for strong interconnection language. I am pleased that the draft of the legislation includes language. However, I see some room for ambiguity. Mr. McSlarrow, if you will, do you think the committee print should be clarified or do you think this section will be subject to litigation for years on what is or considered, quote, necessary, end quote and effectuate interconnection? Could you comment on that for me?

MR. MCSLARROW. I think as currently drafted, it would risk litigation. I think we can clarify it by making clear that just as the competitive local exchange carriers have access under Sections 251 and 252 to all the necessary requirements and rights for interconnection that

regardless of the technology, and if you are a VOIP provider that you can get all the same rights under those same two sections.

MR. STUPAK. Does anyone else care to comment on that?

MR. MCCORMICK. Yes. I think part of that you may want to include, regardless of regulatory statutory classification, since there is a definitional differential between certain types of providers.

MR. STUPAK. Anyone else? Okay. Let me ask about national franchise, and it is another issue that I have spoken about often in this committee, about my concern that we close the digital divide that the haves and the have-nots are not determined by region or city. I am concerned that this bill will actually turn the digital divide into a micro problem, as well where the haves and have-nots are determined by the neighborhood. While the bill does include an anti-discrimination provision, there is no enforcement language to enforce the provision and the bill includes no build-out obligations. The Telecommunications Act currently says that cable providers must build-out to all households in a franchise area, so Mr. Mayor, if I may ask Mayor Fellman to speak to my concerns, what specific enforcement tools and obligations do you need that are not in the bill right now, and also can you address my concern that it is unclear on how the rights-of-way disputes will be resolved?

MR. FELLMAN. Thank you, Congressman Stupak. I am glad you raised that issue. I was hoping that Chairman Barton would also ask us for our definitions of competitive cable services because I think you would get different definitions there, and your point about build-out goes to that point. Well, under existing cable franchises today there is a variety of mechanisms that local governments use to enforce build-out. It is not uncommon to see build-out or upgrade requirements phased in over a period of years with a provision that fines or penalties are paid by the operator if they do not meet those deadlines. Another option would be a court order mandating compliance within a certain period of time. Companies are usually required to post security in the form of bonds or letters of credit which have the potential to be forfeited if those requirements are not met. So having first the requirements to allow a reasonable deployment over a period of time to serve all citizens and the mechanism to enforce that through these variety of financial means is absolutely essential in our opinion going forward.

To your question about rights-of-way, again, similarly, we have bonds and letters of credit posted. If rights-of-way ordinances or regulations are violated, there is potential for financial penalties. Some of these violations could be violations not of franchises but of local police power ordinances where the remedy might be a citation to appear in municipal court and pay the fine that the court would impose for that. Our biggest concern, as I mentioned earlier, is that under the draft bill it

appears that the only remedy for someone--for a company challenging local enforcement of rights-of-way provisions--is to take that to the FCC. Number one, we are not comfortable with the FCC being the national right-of-way judge, but number two, I think it would be cost-prohibitive for many communities to come to Washington to defend their rights-of-way regulations.

MR. STUPAK. Does anyone else care to comment? Mr. Keefe?

MR. KEEFE. I have two quick points. Two quick points, and it gets back to the issue of, you know, how effective the telephone companies are being in the licensing process. In our experience at Atlantic, we haven't seen telephone companies come in and say oh, we will take what the local franchise--just, you know, take that license, cross out their name, put in ours and we will move forward. They are always looking for a difference, and the two differences we have seen are, there is no specific deployment of network so you get a license and you turn it on whenever you want and not in our areas but wherever you want in some areas, and they have a right to withdraw without penalty, so if things don't go well, presumably they close up shop and move away. None of my licenses have that right.

MR. STUPAK. Mr. McSlarrow?

MR. MCSLARROW. I think on the issue of non-discrimination, the problem we have is that with self-selection and the ability to cherry pick community by community and neighborhood by neighborhood is, you can have the language and it sounds good, but it is just an illusion. The issues about build-out, I mean, I represent the competitor. It would be an odd thing for me to urge you to tell the competitor to compete with us every place, but as a public policy matter, currently under law, that negotiation is placed with the localities to negotiate with providers. That makes sense to us.

MR. STUPAK. Mr. McCormick?

MR. MCCORMICK. Mr. Stupak, thank you. The cable industry deployed voice services over its network without any build-out requirement. They deployed Internet access services without any build-out requirement. There is a redlining prohibition in the bill. The redlining provision is enforceable in two ways. First, the FCC is given authority to require a build-out to specific communities or parts of the communities upon application. Secondly, there is a death penalty provision. If you redline and you are found guilty of a willful or repeated violation, the FCC can revoke your franchise. Those are pretty powerful enforcement provisions for redlining and they are provisions that do not in any way apply to the cable industry's entrance into the voice market or any other competitor's entry into the voice market.

MR. STUPAK. Going back to what Mr. Keefe said that, you know, there are two problems he has with it. There is no specific deployment requirement and there is a right to withdraw. I mean, by the time you get the FCC, you will never get there. You withdraw, then you assess a penalty to something that doesn't exist?

MR. MCCORMICK. Well, if you withdraw, you lose your investment. This is an area where this committee has had wonderful success in bringing competition in telecommunications and in every area, whether it was CLEC entry into voice, whether it was the wireless industry, you have always allowed companies to enter the market and begin to design and build-out a business--

MR. STUPAK. Well, we have greater reporting requirements, and this legislation for franchise, if you want to go for a national franchise, all I see you have to put down there is your name, who you are, your address. There is nothing in there who, when, or where are you going to deploy and what timeframe or anything. I think the reporting requirements would certainly have to be increased in this legislation, a national franchise at least. I thank you, Mr. Chairman. Thank you, gentlemen.

MR. UPTON. Mr. Ferguson.

MR. FERGUSON. Thank you, Mr. Chairman. I want to begin with a question for Mr. Citron from New Jersey. Welcome, glad to have you here. In your testimony you had emphasized how access to E-911 infrastructure by VOIP providers is essential to provide consumers with the protections of E-911. You mentioned in your testimony that in Verizon service areas, particularly in our home state of New Jersey--it seems that Vonage is totally compliant--it provides consumers with fully enhanced 911 service. First, thanks for this cooperation. Your work with Verizon is really a model for how this sort of partnership can work and should work nationwide. In your opinion, why are other parts of the country taking longer to roll out E-911 service by VOIP providers? Are there technological hurdles, and if so, whatever the hurdles are, how have you and Verizon in working together, how have you overcome some of those hurdles?

MR. CITRON. Thank you. It is a great question. Verizon has been an excellent partner to voice over IP industry. When we got together with Verizon at the enactment of the FCC order, Verizon came up with a plan with Vonage to create one set of standards for interconnection to the entire Verizon E-911 network in every single local jurisdiction that they served. That has allowed us to nearly complete our entire build-out in this company with Verizon.

By the same token, many of the other operators that are both RBOCs and more local exchange carriers do not have such capability or have not instituted one. So in those cases, we actually have to negotiate

interconnection capabilities and the technical standards in each and every local market. As a matter of fact, in some markets like Illinois, the one where we are finally making good progress but have had a lot of frustration, the incumbent operators and even the State operators have had difficulty in deciding how it is we would actually transmit those calls and under which standards we would use even though a number of national standards have already been published. By granting access rights to the underlying infrastructure, these operators will be forced to come to the conclusion in a reasonable period of time and grant access.

MR. FERGUSON. Thank you. Again, it is an example of something that had gone right and it is an example of a market and the private sector working cooperatively in a way that is really benefiting consumers and certainly from a public safety standpoint. Mr. Misener, I have a question. Here are some quotations I want to share. Bill Gates in June of 2003: "I am really pleased with how the cable industry has been providing openness on the cable model platform. There is a lot of openness being provided by that platform so I think the cable industry is to be congratulated for that." Chairman Powell said in 2003 also: "I don't know that I have yet seen sort of a compelling record that we have a clear and demonstrable problem on this issue," when he is talking about whether the FCC should regulate broadband providers in terms of content. Commissioner Adelstein said also in 2003 on this issue: "We don't have overwhelming evidence of a problem right now and there would have to be substantial evidence that such mandates are now a solution," she said a solution awaiting a problem. We have a Republican, we have a Democrat, we have a billionaire innovator. All seem to be describing the same thing. They are saying that net neutrality regulation, it seems to be a solution in search of a problem, and until we have evidence, suggesting caution. What evidence do we have, or what evidence are you aware of that there is blocking or a problem in terms of access? What evidence do we have?

MR. MISENER. Thank you, Mr. Ferguson, very much. Currently, very little, but that doesn't mean it is not going to happen. They have the power to do it. They have announced their intentions to do it and the regulations that prevented them from doing it just were released last year.

So they couldn't do it earlier. They were waiting for both FCC action and court decision. They have been on their very best behavior, and noticeably, some of the CEO statements coming out of the telcos were issued after the FCC's final decisions. So they have announced their intentions to engage in this kind of discrimination that I have described.

Moreover Microsoft is part of a coalition that I am involved with, so they're very concerned about this as well as Amazon, and other players

here. Just because it hasn't happened, it doesn't mean that we have to turn a blind eye to the reality of them planning to make it happen. And they have, you know, been refreshingly honest I have to say about their intentions. And so, it is nice to know that that is what they want to do, a nice try. But they ought not to be allowed as a matter of public policy to take their market power over the network and extend it to market power over content, in a way that has never been allowed before.

MR. FERGUSON. I would just echo, and my time is about up, what Chairman Barton was talking about before in terms of it is very difficult to address a problem unless we can really get our arms around it. And unless we can turn to the experts to help us get our arms around it, it doesn't seem like there is any chance whatsoever, in the near future at least, that there will be any kind of consensus in terms of the experts, you all who we turn to get our arms around this problem. And it seems to me that the language that is included in this draft, in a very reasonable way in the short-term addresses this problem in an appropriate way. It leaves open the possibility obviously, of looking at this as we gather evidence. But I would, I don't have any time left, but I appreciate your comments. I thank all of you for being here today.

MR. UPTON. Mr. Pallone?

MR. PALLONE. Thank you, Mr. Chairman. I wanted to ask about the emergency services also. And I know that Mr. Citron talked about his success in basically rolling out E-911 to 70 percent of the subscribers. So maybe I will ask Mr. McSlarrow, what is happening in terms of your voice over IP services in addressing E-911 in that issue?

MR. MCSLARROW. We are a facilities-based provider industry. And as such, we are fully compliant with E-911 today, and we think that what is in the bill today is a great step forward.

MR. PALLONE. Okay. And then in terms of--going back to Mr. Citron again, you said that you are at 70 percent. What would it take to build up the other 30 percent? I know you addressed that a little bit to Mr. Ferguson's question.

MR. CITRON. Sure. We have plans in place currently to build-out to everyone of our customers E-911 capability. I think there are two points here that we should recognize. First, today, the requirements for E-911 should be really extended to all Americans, not just those who use voice over IP. Secondarily, in order to continue to build that we absolutely need liability parity. There are emergency operation centers in this country who refuse to answer a Vonage voice or IP 911 call, because they are afraid of liability. Nina has actually written on this topic to this committee, and we would urge the committees to move forward to ensure that liability parity is provided. Then following access to underlying elements, one of the differences between us and the cable

operators, we are not facilities based. So our consumers move around a lot. And therefore we need to build that now, not just where we physically have infrastructure, but the places where we don't. And therefore we will need access to those underlying elements.

MR. PALLONE. I wasn't going to ask about the liability issue, only because it is really not within this committee's jurisdiction. I guess it is more with Judiciary. But I, you know, I understand the concern over that regard, but we just don't normally deal with it in this committee. Let me ask the Mayor, in terms of these E-911 issues, in terms of, you know, local access or whatever. Would you want to comment on any of this in terms of, you know, the significance of it?

MR. FELLMAN. Well thank you, Congressman. I think anything that improves public safety we support. And we have in other proceedings at the FCC, the national associations have been pushing for, ever since VoIP was on the screen of requiring 911 services to be available on that kind of a service. So we appreciate the fact that it is in this bill. Personally, I am a little concerned that the FCC is going to have the authority to determine or to require it unless it is not technically or economically feasible. And I think if we are going to deploy this technology to all Americans, then all Americans ought to have access and to be able to call 911 if they have an emergency. And in just the concept that the Commission might say, well it might cost too much to do it with the kind of technology you are doing, so we won't require it in that circumstance, gives me cause for concern.

MR. PALLONE. Okay. I have about a minute-and-a-half left, so if you want to talk about the liability a little more. I mean I know again, it is not within this committee, but if you want to talk about how that impacts you, you know, I would appreciate your comments.

MR. CITRON. Well absolutely. Well as recognized in my testimony, we do agree and share and worked with mayors in many towns about doing whatever is capable for making E-911 available to everyone. And the biggest problem we have is we have literally jurisdictions who will not take that call. And if mayors are empowered or other legislators, or let us say the bodies to afford the liability protection to mandate the ability to take those calls, of course that would be very helpful. The thing, and another note that has been raised as well and in reference to my testimony, is that we also do collect 911 fees and remit it back to States. And one of the things that we would ask for as well, is to make sure that these States use these fees to continue to upgrade the build-out of the 911 centers. So that they can have the most advanced technology in order to rapidly respond to a customer's call.

MR. PALLONE. Okay, thank you. Thank you, Mr. Chairman.

MR. UPTON. Mr. Bass?

MR. BASS. Thank you very much, Mr. Chairman. I have to preside in exactly seven minutes. So I am only going to ask one question. I was wondering if those of you who have not made any comment yet, could you comment on the issue of a single Federal franchise, all local franchises, or the hybrid idea that I am pushing for which is to have a Federal franchise as a backstop, but enable the States to have a franchising option which they could adopt and implement in their own territories. Anybody want to comment? Yes, sir?

MR. FELLMAN. Congressman, thank you. I have listened with interest in your opening comments about the need for, in your opinion, States to have the flexibility to deal with their localities because of the unique nature. And I would just take that one step further and say we currently have in Title VI of the Communications Act a Federal franchise framework that allows for a local role in that process. So I guess where I would disagree with you, sir, is to continue to reform the Federal framework for franchising, but to allow the local decisions to be made locally, and not at the 50 State capitals.

MR. MCCORMICK. Thank you, Congressman, for our national scheme. And just get onto it. Allow consumers to have the benefits of choice.

MR. MCSLARROW. And like Mayor Fellman, I think our preference is to take the existent system and streamline it, and reform that. I think probably the least preferable would be one where we remove the local accountability. We don't have national uniformity and we end up going to State PUCs.

MR. BASS. Anybody else want to comment? If you don't, I will yield back, Mr. Chairman.

MR. UPTON. Mr. Inslee?

MR. INSLEE. Thank you. Mr. Misener, you talked about taking issue with the statement that we have had no protection or regulation of the Internet before. You asserted that we had an environment in that regard, and that has been successful until fairly recently in preventing discrimination and preventing the violation, sort of a neutrality principle. Could you elaborate on that and tell us from a historical standpoint, what you mean has occurred in that regard?

MR. MISENER. Certainly, Mr. Inslee. We had a circumstance where over the past three or four years, the FCC aggressively deregulated the broadband infrastructure, the broadband networks. In many of the rules that had heretofore applied to broadband networks provided by the telecos, primarily the wireline providers, truly were outdated and needed to be dispensed with. And it made a lot of sense to get rid of them. But unfortunately, we believe the Commission went too far and got rid of all the rules. And, in particular, it would make sense to us to remove a non-

discrimination requirement only after it was shown that the market were truly competitive. That is to say that a consumer had access to more than just true broadband service providers. And that simply isn't the case now, as much as we would like it to be, and it won't be the case anytime soon. And so we are asking essentially for a reinstatement of just the non-discrimination provisions. Not all the other things, tariff for filing requirements, entry/exit rules, those sorts of burdensome rules. And so it is just trying to preserve the longstanding environment in which the Internet in this country grew up and has been so successful.

MR. INSLEE. Now folk who have sort of suggested we don't need a net neutrality provision have argued that they do not intend on degrading transmissions, like putting those annoying bells on your transmission. But you have made the argument they are essentially charging for additional services, that in a sense is degradation or an equivalent of that. Could you tell us what you mean by that?

MR. MISENER. It is a great point. And I think this is one that is missed frequently. That somehow you can prioritize some content without degrading other content. The way the Internet works is there are lots of very high capacity computers spread all around it, they are called routers. And these routers take information in, and they pump it out. And the way a router typically works, is the first bit of information that comes in, is the first one that goes out. But if you are in a circumstance where someone has been able to pay to have priority, that means that their bits could arrive later, at a later moment and actually is leapfrog over the prior arrived bits and be sent out first. Well that means that the other guys bits are degraded. It is not possible to offer paid quality of service, or prioritization in this way, without degrading other traffic. What we said is it is fine to prioritize some kinds of traffic, be it emergency services, be it live video over say data files which can be delayed a couple of seconds, and no one will care. But when you start getting payment for it, that means that some other people who can't or don't pay will necessarily have their service degraded.

MR. INSLEE. Thanks. Mr. McCormick, I wanted, one of the things that is troublesome to me in this draft is that I think for the first time that I am aware of would especially prohibit this agency from moving forward in what I consider a positive direction in net neutrality, and would sort of neuter this agency to be able to deal with that issue. And that causes concern to me. That in combination with this bill that simply talks about principles, you know, the good book has the Ten Commandments, it doesn't have the ten suggestions, or the ten principles. And even the Ten Commandments aren't always honored I am told. If we really want to have this principle to be followed, to be respected, if you bought these concepts that we would need to have a

non-discrimination between bits on the Internet, shouldn't we have a stronger regulation? And shouldn't we stop removing the tools that are available for the FCC and move forward?

MR. MCCORMICK. Congressman, let me see if I can respond to that in a thoughtful word. The principles say here that consumers are entitled to competition among application service providers and content providers. And the bill says you shall not do rulemaking on that. So if the FCC were to have rulemaking authority, and if the concern was not about Amazon, but about the next Amazon. And the issue is how does the little garage store guy even get noticed on the search engine that categorizes searches by the most frequent searches? So if Amazon is already number one, then Amazon is always going to be number one on a Google search engine. So should the FCC prescribe that, because that is really not net neutrality, but if the FCC were able to write rules under these principles it could do so? Or similarly, if somebody were to say, we are really concerned that Google, what if Google begins to sensor political speech as it has done in China? It has done that. We are concerned it may do that here. So maybe we should apply to the FCC to write regulations to make sure that content and service providers don't do that.

Congressman, this is a very dangerous thing. We would be the first country in the world to be regulating the Internet. And other countries may then say, well if the United States is going to regulate the Internet pursuant to its culture and its values, then we should be regulating the Internet pursuant to our culture and our values as well. In the absence of a real problem, we should not give regulatory authorities this kind of jurisdiction.

MR. INSLEE. Just a quick follow-up. Our time is concluded, we have more to deal with tomorrow. Thank you.

MR. UPTON. Let me just say that we have a series of votes on the floor. I want to go to Mr. Terry, and after Mr. Terry is done, we will adjourn for about 20 minutes and come back. We are trying to get your hearing in the Senate delayed a little bit as we talk. So, Mr. Terry?

MR. TERRY. Thank you, Mr. Chairman. And I do appreciate the level of work that you and Chairman Barton and Jeff had put into this bill. And my focus is going to be on the franchise aspect of this. And Mayor Fellman, I am going to put this question to you. I spent eight years on the Omaha, Nebraska City Council before I came here. So when the issue of a national franchising plan was brought to this committee and myself, the first thing I thought of was the cities and their roles in here, considering I was Chairman of our Cable Subcommittee, and helped negotiate the city's latest agreement with Cox Cable. So to make a long story short, I went through and I came up with a list of

principles that I thought were appropriate in the sense that competition with video is appropriate. It is good. I have seen that in Omaha. It gives consumers or my constituents choices. I also thought that a streamlined approach would help the rule out of this competition. But I wanted to preserve some involvement by the cities. And so I developed a draft discussion that preserved the city's role by what I call most favored nation. That a new entrant could automatically, it could do one of two things. If they wanted to streamline it and not have to sit down and negotiate with Omaha or Denver, they could just accept what the city had already adopted on the major contract elements. Or they can opt for negotiations. That was, I thought, the best deal for the cities, but the League of Cities disagreed with me and said, it didn't go far enough for them. And that left me with the impression that they wanted an all or nothing approach, which really frustrated me in this process, and left me without any, my whole point was to protect the cities' roles in this. I just wanted to ask you in your discussions, you are the representative from the League of Cities here today. What did they tell you has been their involvement and the League of Cities true desire if they were to write this bill, just status quo?

MR. FELLMAN. Congressman, thank you for that question, because I think there is a disconnect here. I serve on the National League of Cities Information Technology and Communications Committee, I am the past chair of that committee, and I have been one of the elected officials from the League that has been involved in some of these discussions. I don't recall ever being told about your proposal, so I apologize if there has been a disconnect. What you described is actually very similar, not exactly the same but similar, to the principles that Senator Burns and Senator Inoue have come out on the Senate's part.

MR. TERRY. Yes, although I came out with it first.

MR. FELLMAN. Well then I am here to give you credit for that. We support the principles and while I would tweak, and of course the devil's always in the details, I would love to work with you and your staff on the framework that you just described. I am surprised to hear you say that the League said it was a non-starter or something like that. So I would—

MR. TERRY. I will verify who told us that, because when even the League of Cities wouldn't support it, it went on a shelf. And I told our Chairman that I had no amendment to that, even though I had drafted one, because I wasn't going to introduce something that wasn't going to be supported by you all.

MR. FELLMAN. I will commit to you on behalf of the League that we will sit down with you and your staff between now and the time of markup. And if what you are describing is consistent with our position,

and I think we can reach some agreement to allow you to offer an amendment concerning your--

MR. TERRY. Well I appreciate that support, but I am not sure it is going to be welcomed above, the--at this level in the discussions. But I wanted to get that out. I appreciate that that is something that you felt was important. I am going to go back and track down where the disconnect was from the people we talked to and you.

MR. FELLMAN. And I will do the same.

MR. TERRY. But then I also want to talk to Mr. McSlarrow from NCTA. I am sorry I missed your discussion. It is one of those days where you have a bazillion meetings, and you try and get here for the important parts. Now where do you stand on this committee's draft, on the franchising language?

MR. MCSLARROW. Our preference is still along the lines, very much of actually what you described, which is reform and streamline the local franchising process. But as I have told the Chairman, I think this draft represents a significant process. If you are going to go down a national franchising route, I think there are fixes that I would recommend to this committee. But fundamentally, we think that you don't have to throw everything over board. You can actually fix this system and ensure a speedy entry by new competitors.

MR. TERRY. Very good. That is all the questions. I think I will yield back.

MR. UPTON. Yeah, we have got four minutes to go. So we will come back in 25 minutes.

[Recess.]

MR. UPTON. I know that the members of the first panel are anxious to move along to various things, airplanes, and Senator Stevens. And we are going to continue--ou can shut those doors--with Mr. Gonzalez. Mr. Gonzalez?

MR. GONZALEZ. Thank you very much, Mr. Chairman. And I will try to hurry along. Mr. McSlarrow, let me ask you. The cable industry as we know it today, historically speaking, did it ever engage in any of the practices that you fear some of the new entrants may be engaging in, such as cherry picking, the selectivity that you were talking about?

MR. MCSLARROW. No, because in each case the rollout of the network itself, which initially was essentially just to deliver video service, was something that was negotiated with the community. And so there was recognition that you would provide service as broadly as possible within the community, there might be some places where that was uneconomic, but that was subject to negotiation with the cities. And then later, when we rolled out voice services and high speed data, we rolled those out to the entire network that was already in place.

MR. GONZALEZ. But when you were a first entrant, because you were the first of course in the video, the truth is you were incredibly selective, at least if I remember the experience in my city. And the reason for that is because economic models dictate that you have to basically survive the rollout and the build-out in order to continue to service all areas, as many areas as possible. And I think the mayor was talking about how you can do that, phasing it in and such. And you don't think any of that is going to be applicable to let us say the phone companies, or Verizon, and Colorado, Texas or whatever, or in bigger areas? That there is not going to be any kind of negotiation at any level if we had a Federal franchise that will obligate them working within a reasonable economic model to provide their service?

MR. MCSLARROW. I don't know is the short answer. I think you put your finger on it. Economic actors are going to do what is in their best interest. I am not pretending to have a white hat, no industry does. They will pursue their opportunities as they think makes sense economically. What is different historically in terms of how cable service has been delivered is that it wasn't just up to us. We had to negotiate with someone. And that someone, the city municipality, whoever, may or may not have gotten it right. But they were an objective third party that was part of that equation.

MR. GONZALEZ. And you don't think any other type of formal process, or economic factors, the realities of the marketplace will be in play that will basically result in these same companies, the new entrants taking into consideration the same factors that the initial cable providers did when they first rolled out and built out?

MR. MCSLARROW. It is quite possible. The only point I would make is that if you look at what SBC told Wall Street just months ago, they basically said that is not our plan. Our plan is we are going to go to particular neighborhoods, so-called high value neighborhoods. And we are not going to go to low value neighborhoods. So it may or may not turn out to be the case, but that is the plan.

MR. GONZALEZ. I am not real sure if that is the statement that was made in the complete form and such, because I don't think that is what is going to happen. Nevertheless, I think we do have that responsibility, and that we are very mindful of it. But I think you ought to advance an argument, and I know some of my colleagues are, and we need to be careful about it, that the new entrant is going to come and cherry pick. And so if they are coming into Los Angeles, they are only going to go ahead and go into Brentwood, or whatever it is. Do you truly believe that is going to be the case?

MR. MCSLARROW. If you just look at it where they have announced that they are going to serve, I think it is plainly the case. I mean you can—

MR. GONZALEZ. No, that is your honest opinion, that is fine. I understand where you guys are already out there. Your build-out is built out. Now let me ask you, some of the new services that you have, a voice over Internet protocol, your broadband, Roadrunner in San Antonio and such, do you selectively, and do you pick and choose certain market areas within your service area, to more aggressively promote those particular services?

MR. MCSLARROW. I am sure we do and--

MR. GONZALEZ. Now why would you do that?

MR. MCSLARROW. In part, because it is subject to whatever competitive pressures you are under. I mean in other words, what is happening right now is with two satellite providers, you have got promotions and discounts happening all over the place, you know.

MR. GONZALEZ. Well, but you are ruling out a new service, this is new territory for you. It makes sense that if you want to be successful and be able to continue it, and to expand your market share, is to promote it in those areas where you probably have a more likely customer, doesn't it?

MR. MCSLARROW. It could.

MR. GONZALEZ. Well I, you know, I never had a small business. I was a sole practitioner in law. But it seems to me that a lot of these things that you always talk about market forces, you do have some objection to it, and you would like to see the Government come in and maybe have a more direct approach to things. And we will explore all of that. My time is up, and I will submit some written questions to you and to other members of the first panel. Thank you very much for your time.

MR. UPTON. Mr. Pickering?

MR. PICKERING. Thank you, Mr. Chairman. Mr. McCormick, how are you today?

MR. MCCORMICK. I thank you, Congressman.

MR. PICKERING. Are you in support of a number portability dialing parity for competitors?

MR. MCCORMICK. Pardon?

MR. PICKERING. Do you support number portability dialing parity for competitors?

MR. MCCORMICK. Yes, we do.

MR. PICKERING. So you wouldn't have any problem if the language is unclear on the interconnection, or the rights and obligations for VOIP, making sure that as cable enters that they would have the rights to

numbers and dialing parity? So that wouldn't be a problem to just clarify, in the underlying text?

MR. MCCORMICK. Well we think that if the VOIP providers wanted to be treated as telecommunications carriers, they should come in subject to the full societal responsibilities that obtain, including universal service, access for people with disabilities, and protections of customer privacy.

MR. PICKERING. So you would say, you know, CLECs today have interconnection rights to numbers and portability, and a limited access to network elements. And that is the current access and cable today goes through CLECs to get access to provide VOIP services. In the underlying bill we want to give cable that direct, same rights and obligations. You wouldn't have a problem with that would you?

MR. MCCORMICK. Well, I guess I am not completely following your question, Congressman. If what you are saying is that IP voice providers want to be treated not as information services, but instead as telecommunications services, and you want to afford them the rights that are inherent with being telecommunication service providers, we have no objection to that, so long as they also undertake the obligations that obtain to telecommunications service providers. And those obligations are sort of fundamental, the societal fabric of our Nation. Access for persons with disabilities, customer proprietary network information, issues like those. So I think we are quite open to the competition in this area.

MR. PICKERING. So if we included those obligations, you would have no trouble giving cable the same rights and obligations as CLECs have?

MR. MCCORMICK. Well I think, yeah, I think the way the language is that in effect says that the VOIP providers will be considered, and elect to be considered providers of telecommunication services when it comes to voice services.

MR. PICKERING. So you have no problem with that provision?

MR. MCCORMICK. I already clarified that they have rights to numbers--

MR. PICKERING. Obligations the same, right?

MR. MCCORMICK. Yeah, parity and obligations should go with parity to rights. So just to clarify, the intent of the interconnection, or VOIP rights and obligations, is to have competitive symmetry. So that as cable enters into voice services that they have the same rights, and importantly, the same obligations as CLECs currently have. And no more, no less, so that there is regulatory and competitive parity as we facilitate, just as we are removing barriers as you enter into the video market. There have been cases, for example, in South Carolina, where

CLECs who are VOIP providers have been denied certificates as a telecommunications provider or service provider.

MR. PICKERING. And so we just want to remove any barrier on both sides of the fence, and I think that we are in agreement, is that correct?

MR. MCCORMICK. Well, I am aware of those cases, and what I am suggesting to you is that language in this legislation goes halfway. It confers rights, without conferring the corresponding obligations. Those obligations--

MR. PICKERING. But at the same time you don't owe the same obligations that--as you are a new entrant into video. Should you have the same obligations as cable companies have in providing video service?

MR. MCCORMICK. We believe, I am saying that with regard to VOIP operators, those telecommunications services with regard to interconnections should be subject to the same societal obligations with regard to any other services.

MR. PICKERING. I understand what you are saying as far as their entry into your market. If you entered into their market--

MR. MCCORMICK. We have never suggested that CLECs or VOIP providers be subject to the full panoply of common carrier regulation that applies to voice. So there are at least nine specific requirements that apply to incumbent voice operators that don't apply to either CLECs or to VOIP operators. And this committee has historically said that with regard to new entrants, we shouldn't apply the legacy monopoly regulation. So in connection with video entry, we are willing to undertake those obligations of a competitive nature such as paying franchise fees, and having PEG channels. But with regard to requirements to build-out to a footprint that doesn't match our footprint, those requirements were imposed in an era where there was in many cases a single provider who was receiving the franchise.

MR. PICKERING. Mr. McCormick, I understand what you are saying.

MR. MCCORMICK. Okay.

MR. PICKERING. But just again to clarify here. Mr. McSlarrow, how important is this provision for you, just as we want to accelerate video entry and maximize video competition? How important is this provision for cable and VOIP providers to provide voice competition and bundle services--voice, video, data and wireless--so that you can compete? And let me say this, for those who want build-out, the best way to get built out is to make sure that both Bells and cables completely compete in their full footprints. Interconnection policy is critical to having full competition in all services in both markets. And if you want build-out, getting this provision right is critical from a market perspective and having capital incentives, so that you don't lose market share, instead of

some government mandate driving market interaction and investment. So Mr. McSlarrow, how critical is that to cable that we get this right? And do we have it right in the current form?

MR. MCSLARROW. It is critical. You said it better than I could. I mean the reality is that in the video marketplace, we have satellite competition that already has 30 percent market share and cable 65. When you look at voice, ILECs have 85 percent plus market share. Fundamentally encouraging voice competition is important. With VOIP we have an opportunity for the first time, both with facilities-based and non-facilities based, to bring that kind of voice competition to America. Two things I would say--and you kind of hit on one of them already, or both of them, probably--that I would recommend we change is adding to the language on interconnection that is in the draft today, to make clearer that the other rights that CLECs have to number portability and things like that are also being referenced. And number two, to make sure that a VOIP provider really has two paths. They can either have direct interconnection rights, or they can go through a CLEC if they choose. And either way works.

MR. PICKERING. Thank you, Mr. Chairman.

MR. UPTON. Mr. Dingell?

MR. DINGELL. Thank you. First question to Mr. McCormick and to Mr. Fellman. Gentlemen, yes or no, would you characterize the wireless industry as competitive? Mr. McCormick and Mr. Fellman, what is your answer to that?

MR. MCCORMICK. Yes.

MR. DINGELL. Yes. Mr. Fellman?

MR. FELLMAN. Yes.

MR. DINGELL. Okay. Now to you, Mr. Fellman, does existing law allow localities to grant exclusive cable franchises?

MR. FELLMAN. No.

MR. DINGELL. It does not. Would you agree--oh, I am sorry. So when the localities impose franchise requirements on cable operators, the basis for doing so is not that the provider is a monopoly provider, but rather the basis for the franchise requirements is because the provider seeks to use public rights-of-way to offer service for profit. Is that right?

MR. FELLMAN. Absolutely correct, Congressman.

MR. DINGELL. So then again, Mr. Fellman, so it is the use of the public's property interest, not the monopoly or exclusive rights that underlies the redlining provision in existing laws, and the requirements to build-out service to all residential households? Is that right?

MR. FELLMAN. That's right.

MR. DINGELL. And then when residents of the town through their elected officials turn over valuable public property rights for commercial

use by the private company, it is reasonable to ask in return that the public participate in the benefits of that use, is it not?

MR. FELLMAN. Yes.

MR. DINGELL. Do you differ with that, Mr. McCormick?

MR. MCCORMICK. No.

MR. DINGELL. And in fact that the Federal government when it turns over its property rights, it imposes similar requirements on private entities who they gave the right to use such valuable public property for their own commercial interest? Is that right, Mr. Fellman?

MR. FELLMAN. That is my understanding, yes.

MR. DINGELL. Now for example, the wireless industry, which both you and Mr. McCormick agree is a competitive industry, the Federal government imposes requirements on the use of its public property interests, in this case the spectrum? Is that correct?

MR. FELLMAN. Yes.

MR. DINGELL. Now in granting spectrum rights, the Federal government imposes construction and build-out requirements to foster ambiguous deployment of service, particularly in rural areas? Is that correct?

MR. FELLMAN. Yes, it is.

MR. DINGELL. Do you agree with that, Mr. McCormick? Yes or no?

MR. MCCORMICK. On a license basis, I do.

MR. DINGELL. I am sorry?

MR. MCCORMICK. Yes.

MR. DINGELL. Okay. Now some other companies are required to serve 75 percent of their marketer rights within 36 months. And PCS licensees are subject to geographic and population-based benchmarks, to ensure that licensees build-out their systems, or face automatic forfeiture of their license? Is that right, Mr. Fellman?

MR. FELLMAN. That is my understanding, yes.

MR. DINGELL. That meant that PCS licensees had to serve one-third of their market's population within five years, two-thirds within ten years. Yet, nobody claimed then, or do they claim now that these where less companies were monopolies, is that correct?

MR. FELLMAN. That is correct.

MR. DINGELL. So when we heard the arguments that non-discrimination in build-out requirements, are mere vestiges of the cable monopoly area era, that is not correct, is it?

MR. FELLMAN. I would agree with you, that is not correct.

MR. DINGELL. All right. And without a build-out requirement, this bill then would confer on a private company the rights to use the public's property for service, to only a select few people? Is that correct?

MR. FELLMAN. Yes, it would.

MR. DINGELL. Now tell Mr. Fellman, as a custodian of the people's property in your city, would this be considered by your citizens to be a responsible use of public property?

MR. FELLMAN. I don't believe that it would.

MR. DINGELL. Thank you. Mr. Chairman, this is going to surprise you greatly. I yield back the balance of my time.

MR. UPTON. Thank you. Mrs. Blackburn?

MRS. BLACKBURN. Thank you, Mr. Chairman. And thank you all for your patience today, we appreciate it. We are interested in the issue and are anxious to hear your remarks. Mr. McCormick, I was listening to Mr. Fellman's testimony and I got the not so subtle impression that he likes the status quo. And so I was thinking about my good friend, Leroy Knowles, over in McMinville and Shelbyville with Bendlum and Telephone Company, and I just would like for you to very briefly, 30 seconds, tell me what you think Leroy would have thought of this testimony?

MR. MCCORMICK. Thank you Congressman. Well as you know, Leroy Knowles serves a little over 40,000 customers in middle Tennessee and, you know, his telephone company is a co-op. It is owned by its customers, and they have invested to upgrade their plant, so that it is capable of offering high-speed Internet access and video. But in order to offer video to the customers that own the cooperative, Leroy Knowles has to get 25 separate franchises. He's been at it for a year-and-a-half, he doesn't have half of those 25 franchises yet. And one of the reasons he doesn't have the franchises is that every franchise area he goes into, he's challenged by the incumbent cable operator. And some of those franchises he may only have 100 customers in that particular franchise area, because he crosses three rural counties in Tennessee. And the franchise authorities want him to build-out to the rest of the franchise area. So he may touch the corner of a county with 100 homes, and they say sorry, you can't have a franchise until you build-out to the rest of the county. So as a result, his customers are being denied a choice, a choice that as owners of the cooperative they've invested in, but they can't obtain.

MRS. BLACKBURN. Thank you, I appreciate that. Mr. Fellman, thank you for being here today. I need to ask you something. Reading your testimony, I understood you were here as the Mayor of Arvada, is that correct?

MR. FELLMAN. That is correct.

MRS. BLACKBURN. Arvada?

MR. FELLMAN. Arvada, right.

MRS. BLACKBURN. Well, I am southern girl. Arvada works real well with me.

MR. FELLMAN. However, you would like--

MRS. BLACKBURN. Okay, let me ask you this then. You said you have a legal practice, and you also represent cities and counties, so are you imposing your position on representing cities, municipalities, on these issues into your testimony?

MR. FELLMAN. No.

MRS. BLACKBURN. No. So that doesn't color your opinion at all?

MR. FELLMAN. Not at all.

MRS. BLACKBURN. Okay. Now let me ask you this. It is my understanding that you have got two cable companies that serve Arvada, correct?

MR. FELLMAN. Two that serve today, actually three that have franchises. Two that--

MRS. BLACKBURN. Okay, so two that are serving. Do these two compete head-to-head?

MR. FELLMAN. They do not.

MRS. BLACKBURN. They do not. Now I had my staff call when I found out--

MR. FELLMAN. I am aware.

MRS. BLACKBURN. You are?

MR. FELLMAN. Yes.

MRS. BLACKBURN. Okay. And I asked them why they didn't compete. Do you know what their answer was to me?

MR. FELLMAN. I know what my Assistant City Manager told me his answer was. I don't know how that was described to you by your staff members.

MRS. BLACKBURN. Their answer was because they don't want to. That was the answer. Is that they don't want to. They serve different areas.

MR. FELLMAN. My Assistant City Manager advised me that he began to describe the various legal threats and potential litigation and regulatory hearings that began when the council tried to bring this to a head. And that the conversation then took a different direction, so he didn't complete his explanation.

MRS. BLACKBURN. Okay. All right, and the third franchise that has been granted is to Champion Broadband?

MR. FELLMAN. That is correct.

MRS. BLACKBURN. Okay. And how much of the city does Champion Broadband serve?

MR. FELLMAN. As I mentioned, they don't serve anyone.

MRS. BLACKBURN. They don't serve anybody at all. Okay. And let me ask you this. Looking at the situation that you have there, where you have two franchise operators that do not compete head-to-head, that are

in separate areas, and then you have a third one that hasn't been able to get off the ground. In your capacity representing the mayors in the cities, and looking at your experience that you have had, where build-out requirements promoted new entrants to come in and compete with, where you had to have the build-out requirements. In your situation where you have to have build-out requirements, does this help or hinder your customers? Is it helping with competition in your city? Is it hindering competition? Are your constituents better served looking at it not as legal counsel, but looking at it as the Mayor?

MR. FELLMAN. With respect to Champion Broadband, I don't believe that the build-out requirements had anything to do with that company's decision not to serve. They obtained franchises in almost every city in the metro Denver area, which is over 30 communities; they actually do serve in two cities. And when the market fell out on the industry in the late '90s, around 2000, they ran out of money and they stopped building their system. So the build-out requirement did not stop them, the market stopped them. As far as how build-out requirements help or hurt our customers and our citizens, I don't believe that the build-out requirements are impacting it. When we had our legal battles with, I think it was AT&T Broadband at the time and U.S. Cable, it was more--

MRS. BLACKBURN. So let me interrupt you, just a little bit there. So you don't think build-out requirements have any affect on this at all whatsoever?

MR. FELLMAN. I think it has some affect on it, absolutely.

MRS. BLACKBURN. Okay.

MR. FELLMAN. But I don't think it hurts our subscribers. I think the reason we don't require that competition is not because of the build-out.

MRS. BLACKBURN. Okay. Do you represent any of these in the greater Denver area, of those 30 communities, do you represent as legal counsel any of those?

MR. FELLMAN. On a periodic basis, yes, I do.

MRS. BLACKBURN. Okay, all right. Thank you, Mr. Chairman, I yield back.

MR. FELLMAN. Including if I might add, communities that do have wire line competitors today.

MRS. BLACKBURN. Okay. Thank you.

MR. UPTON. Just trying to move along, because I know the Senate Hearing is starting very soon. Mr. Rush?

MR. RUSH. Thank you, Mr. Chairman. Mr. McSlarrow, you have indicated that cable always welcomes competition. And frankly, I want to say that you have been a passionate champion for minority rights. And as I said after this hearing, I really want to talk to you more about the lack of programming on cable networks. But the question that I have

right now is what specific suggestions do you have that might address the issue of adequate enforcement to ensure non-discrimination that we might consider as a part of this draft?

MR. MCSLARROW. I can think of two.

MR. RUSH. And whether or not you want to address the issue before the sources are rolled out, or look back and make a judgment after they have been rolled out? If you want to do it beforehand, I guess I would, even in a national franchising framework, wonder why a local community, whatever the jurisdiction is defined, couldn't participate in a deployment schedule with whatever the provider is? If you want to do it after the fact, and just make it an enforcement mechanism and make a judgment, then I would say you could do two things. One, how do you judge the selection process of the communities that are being served? And number two, I would say that the enforcement mechanism should. Mr. McCormick, do you have any response to that at all?

MR. MCCORMICK. Yes. First Congressman, we really appreciate your support for this legislation for video competition and video choice. We think that the legislation takes a very appropriate approach to the issue of redlining, or where there is any part of the community that is not being served on the basis of economic value. And that the penalty is basically injunctive relief, or revocation of license. So the FCC that can direct upon application of a community that there is an area not being served and it must be served. In the case of a willful repeated violation, it is a death penalty provision that says that the Commission can revoke a license. The cable industry 22 years ago came to this committee and said that there needed to be a Federal scheme, because of overreaching by cities. And we are coming to you today and saying with regard to introducing new competition there has been overreaching, and it is time for some more Federal schemes. So that is our position.

MR. RUSH. All right. Thank you, Mr. Chairman. I yield back.

MR. UPTON. Mr. Gillmor?

MR. GILLMOR. Thank you, Mr. Chairman, and a couple of questions for Mr. McCormick. I mentioned in my opening statement I represent a rural district in Ohio, and unlike many of the metropolitan areas, my constituents lack the availability of a lot of advanced telecommunication services that are generally commonplace and even expected in urban areas. Realistically, what are the prospects that this legislation will enable rural telephone companies to go into competition with local cable providers?

MR. MCCORMICK. Well realistically, a very high possibility. There is no group, or disadvantage in small rural telephone companies by the franchising process. In Minnesota for example, in Lakedale, Minnesota, it is a small community. It has one traffic light, one gas station, one

grocery store. But there are four wireless providers of voice. There is a cable television operator who provides voice service. And there is a telephone company that provides voice service. So the telephone company upgraded its plant to deploy video, but the local franchising authority won't let them offer it. They have for over two years taken this all the way to the Minnesota Supreme Court. And build-out requirements that go beyond the footprint of the telephone company have precluded that telephone company from being able to offer video service. So for small telephone companies to be able to compete head-to-head, they have to be able to offer the bundle of voice, video, and Internet access. So this is very important to rural companies.

MR. GILLMOR. Okay, thank you. Let me bring up something else, that is Ohio specific. The Cleveland Indians are partnering with local cable systems on a new channel that published reports have stated is going to be priced at nearly double the rate that the Indians games cost consumers last year. And I have been an Indians fan for a long time and I know what their record is. I am not sure why anybody would pay double of what they did last year, but some people apparently are willing to do that. In your opinion, is this increase in price going to hinder your member company's ability to compete with the incumbent video provider?

MR. MCCORMICK. Congressman, we think it is very important that there be access to programming. Particularly that programming that is integrated with a multi-channel video provider. This committee has previously passed legislation to deal with that in the nature of satellite delivered programming. We think that when it comes to regional sports networks and others, that that is an appropriate area for action by this committee.

MR. GILLMOR. Thank you very much. I yield back.

MR. UPTON. Thank you. Mr. Buyer I know is going to ask questions, and as I understand it, he does not have questions for Mr. McCormick, or Mr. McSlarrow. So you two are excused. We will send you a note. Give Senator Stevens our best. And thank him for allowing us to keep you a little bit long. And I yield to Mr. Buyer.

MR. BUYER. Thank you, Mr. Chairman. You are very kind to let me sit in, as I am not a member of the committee. And this legislation is going to continue in the process, I would love to talk to the two gentlemen, but I am not going to hold them up. I am a little concerned when I was listening to the questioning by Mrs. Blackburn, and the mayor, because mayor, you are in a tough position. I don't know who invited you to come here to testify, but I probably would have declined had I been you. Because you are a Mayor, you are also an attorney, you also represent individuals out there, you negotiate these deals. And how

you can separate your views and opinions without having a conflict, you are a better man than I am, because I was just listening to the exchange, and it makes it pretty tough because you are making money out there, and supporting a family. And based upon contracts that you have, and that has to influence your judgments and your testimony. So there is a reason that we ask all of our witnesses what are your contacts, what are your communications, what are your consulting fees. So that the counsel that individuals give to us, that we can have our best judgments. You must be a lot better than I am. But I know that somebody has put you in a very tough position.

MR. FELLMAN. Well Congressman, I put myself in that position, but it is no different than the position of my local elected official colleagues, who work for the telephone companies and the cable companies. And there are many, and we have very heated and passionate discussions over these public policy issues.

MR. BUYER. Yeah, I am quite certain. I was intrigued by the first question from the Ranking Member, Mr. Dingell when he was really kind of excited about the competition, really that there is in wireless. Well yeah, it is thriving and it does really well because it is not regulated. Right? I mean so what do we want to do? We want to get in there and let everybody sort of have at it, push the bounds of technology, we all get the benefit. So whether it is the telephony versus others in voice, or in broadband. Let me ask this, is it an open question. I haven't a clue how all of you would answer. Do any of you share my concerns beyond the semantics, about us, the difference between calling these things cable service versus a video service? Should we actually use the word cable? Is it better for us just to call it video services, since the beyond is undefined, or are you saying Steve, it is just semantics, don't worry about it? Are there any thoughts, nobody? Great, I am the only one that gives a damn about it, huh? I think that is pretty sad ,guys, because none of you want to, you don't care, or you don't tackle, or don't worry about it?

MR. FELLMAN. Congressman, I will jump in. You know, I think the real issue is how we treat the services. And if we end up with legislation that treats like services alike, then we will be doing the right thing. And whether we call it cable, and we define it to include IP television services, or whether we call it video programming services, I am not sure that matters.

MR. BUYER. Right, if we are going to treat all services alike, rather than get into this whole issue about reimbursement for what we do in the rights-of-way. You know, what they do in Florida, maybe is the smart way to do this. They do it as an entertainment tax and everybody is included, and everybody is treated the same. That is why it is pretty

much preferable to call this a video service, and you include satellite in this. Does anybody have any thoughts on that?

MR. FELLMAN. I would love to see it--

MR. BUYER. No, I don't want to hear anymore. These guys are being too quiet. Does anybody have any thoughts about including satellite? Thank you, Mayor.

MR. MISENER. Mr. Buyer, not specifically on that, but to your broader point of looking at this holistically, I completely agree with you. That is why we think it is right to be talking about that with neutrality, or the ability of consumers to get their video services from Internet based sources in the context of national video franchising, because the ultimate goal of all policymakers here is to give consumers more choice. And we see the overwhelming choice picture, the more competition coming in the future from the Internet, rather than from just one more content provider. So rather than looking at this, as sort of doubling the number of providers that are available, we ought to be looking at it as hundred fold, thousand fold increase of possible video providers in the coming years. And so, I agree with you, we ought to look at video holistically, and also consider how regulatory changes recently could actually serve to constrict the amount of video competition, rather than enhance it.

MR. BUYER. Should we have any concerns out there with regard to these municipalities that want to get into the business where they can provide a service, and then find themselves in competition? And then find themselves in dire straits? Is this something that we should say, yes, municipalities you want to get into this business, it is okay? Does anybody have an opinion on this?

MR. KEEFE. I would say a couple of things about that. First of all, the question was municipalities getting into video or Internet, or even the telephone business. I think that the programs that we have seen from some municipalities don't really take into consideration the financial risks that they are putting their cities in front of. And the programs that we have seen in places like Miami Beach, in our opinion are tremendously under the gun given the competition that is in the marketplace. They want to get into the business because they want free Internet for tourists. And it seems like a cool thing to do, and it has been done in other cities. But you know, the issue of network security, who has access to that network, what it is used for, whether or not it is available to fire and police, and the security that comes around that, are all issues that haven't been answered. So I think the financial risk reward is some thing that hasn't been investigated, and I think taxpayer dollars are not well served, getting into this business. And, you know, in my view there is a bit of today, of talking about competition like the telephone companies are going to bring competition to the video

business. I got news for you; there are a lot of the satellite guys today that are out there competing very strongly in the marketplace. In some of our markets like Miami Beach, where we can't buy media effectively because we are a small player in that marketplace, Echostar and DirectTV are pounding that market as well as BellSouth with their products, every second of every day. We don't have that same capability, so we have to compete in other ways. So this isn't bringing more competition to the marketplace, it is already there. If it is a new entrant, that is fine.

MR. BUYER. All right. Thank you, Mr. Chairman.

MR. UPTON. Ms. Cubin?

MS. CUBIN. Thank you, Mr. Chairman. I have only two questions because I know that the hour is getting late. But I would like to ask Mr. Misener, you were discussing premium charges for higher speed and the actions on the Internet. And, you know, talking about why you didn't think that that was right. I agree with the four Internet freedoms that Chairman Powell brought forward and that I know you are familiar with, and he didn't mention anything against premium charges. And if premium charges are so objectionable, why do you suppose he didn't mention that? And then, you know, I make the analogy to a postage stamp. I can pay 39 cents for first class mail, or I can have bulk mail, or I can pay for three-day priority or whatever and, you know, I get different speed, but I have the choice on that. So go into the objection a little better if you will for me?

MR. MISENER. Yes, certainly. Thank you, Ms. Cubin. I have heard this mail analogy before, and there is a shipping analogy, and obviously Amazon does a lot of shipping itself, and so we are sort of familiar with that business. I will try to give you three different perspectives. From the consumer perspective, sitting in her home she has the choice of shipping companies coming to her. She has the choice of at least four, USPS, UPS, DHL and FedEx, probably more. And she can choose among them freely. In fact she can have things delivered to her from two different shippers in the same day at the same moment. Contrast that with delivery over the network, she has the choice of two, either the cable company or the phone company, if she is lucky for broadband content. And the switching costs among them are astronomical. They are very hard. There are long-term contracts, there are equipment rolls, and there are truck rolls, equipment changes; that sort of thing.

From the perspective of the shipper or the content sender, like in Amazon who does both, we send out content on the Internet, and we also ship. We also have four choices of shippers that we can use freely. It is a competitive market. When it comes down to sending content to that one consumer in her home, we face an absolute monopoly. There is

nobody else. No consumer takes two broadband Internet connections simultaneously, so it is a monopoly to get through there. And lastly from the perspective, and this may be the most important point of all, the perspective of the other shipper. The LL Beans of the world, LL Bean and Amazon could both give competing free shipping, great priority service deals to the same customer simultaneously. There is not, there is no capacity constraint that will prevent LL Bean or Amazon from doing a deal with FedEx and UPS, or both simultaneously. That is not the case on the network. If the network operator prioritizes some content over others, by definition, the others get degraded. And so if LL Bean does a great deal with the network operator, Amazon is actually physically precluded from doing the same deal.

MS. CUBIN. And the consumer, how much responsibility does the consumer have to find out those things, before they subscribe to one or another.

MR. MISENER. Well assuming they have a real choice among them. And assuming if there were a competitive--

MS. CUBIN. Or if there are two, you know, then they have a choice?

MR. MISENER. Not as a matter of either practice or sort of theory, I mean the dualopolies do not behave like competitive markets. That has certainly been the experience, and especially when there was such high switching costs. A consumer sitting in her home, faced with this sort of a circumstance, is not going to want to call the truck to come out and switch out the boxes, and give up her year long contract, just--

MS. CUBIN. Why do you suppose Chairman Powell didn't mention anything about the premium charges?

MR. MISENER. Well, he didn't get very specific. These are extremely high level principles that we are adopting. In fact, one of the principles that we are talking about adopting today is one that entitles consumers to competition among network operators. I mean, who is going to be the first person who files that complaint, based on this law, that entitles consumers to network competition, and I don't know how that happens.

MS. CUBIN. Okay. I would like to ask this very quickly of anyone. I wanted to ask Mr. McCormick, but what do you think the scope of Section 717, and this is where VOIP service provider shall have the same rights, duties, and obligations as a requesting telecommunications carrier under Section so on and so on. Where do you think those rights, duties, and obligations are? Does it go so far as to include that cable companies should be able to access the Universal Service Fund? Do you know the section I am talking about in the bill? None of you know? Do you know? We know and you don't know? I think this is an important question, because I am just going to take the time to just read the section,

so that you understand. Let me put the glasses on. A VOIP service provider shall have the same rights, duties, and obligations as a requesting telecommunications carrier under Section 251 and 252 of such Telecommunications Act, with respect to interconnection, including associated rights, duties, and obligations necessary to effectuate such interconnection if the provider elects to assert such rights. So you don't have any idea what those rights, duties, and obligations are?

MR. CITRON. Sure, maybe I will take a stab at this one for a second. So as a leading voice of every VOIP provider in this country, we would like to have the opportunity to purchase services directly from network owners and operators. Today statutorily we are prevented from getting access to underlying elements inside the network. We are statutorily barred from having direct inner connect from getting phone members, from number portability. And so today, in order to get those services, we actually have to go through a third party, a competitive local exchange carrier. There aren't C-locks everywhere in this country, we will have to go and negotiate such deals. So part of the rights that this bill might afford us would be the choice, the choice to go ahead and get access to those elements as specified under Sections 251 and 252. Now those are telecommunication provisions.

MS. CUBIN. Right.

MR. CITRON. I think that the bill itself has made a remarkable step forward in this area. I think that it is has been offered some proffers, that a little extra clarity on what some of those rights are, should be included inside the bill. Also one of the other things I testified to earlier is that when doing so, I want you to also make sure not to lump us in as a non-facilities based voice IP provider, job obligations that don't make sense to us. Obviously obligations to put wires in the ground would not be something that may be appropriate. So we have to figure out a way of having those rights and obligations without actually worrying about the statutory classification that would exist for our provider.

MS. CUBIN. But does everybody agree, that the Universal Service Fund would not be accessed by cable companies?

MR. CITRON. I think the question of Universal Service is actually being raised in a number of different proceedings right now, because there is a question about how this function moved forward. There are questions about who should be able to put in, or be obligated to put in, under what mechanism they should put in, and who would have the rights to go ahead and draw out funding. That is something that needs to be resolved by the Congress.

MS. CUBIN. Thank you.

MR. UPTON. Mr. Markey assures me he has one question, a yes or no question, and a unanimous consent to request?

MR. MARKEY. Yes. I ask unanimous consent to add into the record letters from the AARP, the Association of Public Safety Communications Officials, and a letter signed by over 100 mayors, including mayors from some of the largest cities in the United States, in opposition to the bill. And I make that unanimous request?

MR. UPTON. Without objection.

[The information follows:]

APCO International

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March 29, 2006

The Honorable Joe Barton
Chairman
Committee on Energy & Commerce
U.S. House of Representatives
Washington, DC 20515

The Honorable Fred Upton
Chairman
Subcommittee on Telecommunications and the Internet
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Barton and Chairman Upton:

We are writing to express our grave concerns regarding certain provisions in Title III of the recently released Committee Print of the "Communications Opportunity, Promotion, and Enhancement Act of 2006" which will be the subject of a hearing this Thursday, March 30, 2006, before the Subcommittee on Telecommunications and the Internet.

APCO International is the nation's oldest and largest public safety communications organization. Our nearly 17,000 members manage and operate state and local government public safety communications systems, including Public Safety Answering Points (PSAPs) throughout the nation. We are deeply concerned that Voice over Internet Protocol (VoIP) providers have initiated telephone service in areas where they cannot deliver "9-1-1" emergency calls to the correct PSAP. This has already led to death and injury where VoIP customers have been unable to reach 9-1-1 in a timely fashion. Therefore, we strongly support the rules that the Federal Communications Commission (FCC) has adopted to address this issue.

Portions of Title III appear to promote 9-1-1 and E9-1-1 capability. However, we are opposed to those provisions that would effectively substitute the FCC's current rules with requirements that only apply if "technologically and operationally feasible." We recognize that they may still be limitations on the ability of some VoIP provides to offer full "Enhanced 9-1-1" capability. However, under no circumstances should VoIP services be offered without at least the ability to deliver a 9-1-1 call directly to the correct PSAP through the dedicated 9-1-1 trunk lines. If doing so is not technologically or operationally feasible, the VoIP provider should not offer service in the relevant areas.

We hope that the Committee will make appropriate modifications to the proposed bill before it proceeds further in the legislative process. We also request that this letter be incorporated into the record of the March 30 hearing.

Sincerely,

Wanda McCarley
President
APCO International

cc: Members of the House Energy and Commerce Committee
The Honorable Kevin Martin

March 29, 2006

The Honorable Joe Barton
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable John D. Dingell
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Barton and Ranking Member Dingell:

On March 6, 2006, I wrote to you on behalf of the Association of American Universities, American Council on Education, National Association of State Universities and Land-Grant Colleges, EDUCAUSE, and Internet2 to ask you to include a strong provision preserving "net neutrality" in legislation you develop to update the nation's telecommunications policy. Now that the Committee has released a new draft of this legislation (dated March 27, 2006), I am writing again to urge you to include a strong "net neutrality" provision and to incorporate additional provisions that will promote universal access to broadband services.

As we stated earlier, the power of the Internet to support innovation and economic growth and to promote new forms of communication and social services depends on its open architecture. Net neutrality is extremely important for colleges and universities as they develop new ways to deliver multimedia instructional materials to students, including students off campus and in rural areas. University research laboratories are developing next-generation Internet technologies that will drive the Internet economy; these technologies will require an open and accessible Internet to develop and flourish.

While we are pleased that the latest draft legislation includes a provision addressing the net neutrality concept, we do not believe that the provision as drafted will accomplish the goal of a robust net neutrality mechanism necessary to sustain continued innovation. The draft bill essentially codifies four imprecise principles issued by the Federal Communications Commission (FCC). These principles do not require the operators of broadband networks to maintain an open platform. For instance, the principles do not ban discrimination. As a result, they do not prohibit network operators from giving preferential treatment to their own Internet services over the services provided by universities and others. We urge you to amend the draft legislation to add an explicit statement that the network operators must act in a non-discriminatory manner when carrying Internet traffic.

Finally, we would like to reiterate our support for a national policy that promotes universal access to high-quality, low cost broadband services to all Americans. Last year, the Higher Education community adopted five principles to guide Congress as it considers reforming our telecommunications laws. One of these principles is:

- The United States should adopt as a national goal a broadband Internet that is secure, affordable, and available to all, supporting two-way, gigabit-per-second speeds and beyond.

We thus urge you to adopt policies that promote the widespread availability of high-speed broadband networks to all Americans, including urban and rural and high- and low-income, in order to assure that broadband Internet platforms continue to remain open and available to all users in a non-discriminatory fashion.

Thank you for your consideration of our views.

Sincerely,

Nils Hasselmo

President

Cc: Members of Committee on Energy and Commerce



March 30, 2006

The Honorable Joe Barton
Chairman, Energy and Commerce Committee
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Barton:

AARP appreciates the opportunity to comment on "The Communications Opportunity, Promotion, and Enhancement Act of 2006." While AARP commends the sponsors for promoting competition for broadband services by eliminating the ability of states to bar municipal provision of broadband services, we believe the bill is deficient in two significant areas for consumers: the delivery of video programming services and the preservation of the openness of the Internet.

While the bill promotes a national franchise authority to streamline the process and accelerate competition for video services, it falls short of ensuring important consumer protections the marketplace cannot guarantee. As a result, the bill generally fails to deliver the benefits of video services competition to *all* consumers. At a minimum, we believe the bill should retain the protections inherent within the current local franchise authority.

AARP is also concerned with the absence of any requirement for new video entrants to uniformly upgrade their networks; as a result, many consumers will not have a competitive alternative for video services for some time to come. The subsequent elimination of current local franchise requirements for incumbent cable operators, when a new entrant arrives in their franchise area, may result in cable price increases for some consumers and loss of service for other consumers in areas where cable providers can withdraw from markets entirely. Furthermore, the bill would prohibit state or local officials from adopting additional consumer protections to the national rules. AARP opposes national rules that serve as a ceiling, rather than a floor; state and local officials should be able to serve their communities by requiring standards that meet their consumers' needs.

In short, AARP believes the bill's attempt to promote competition in the delivery of video services misses the mark for consumers. In addition, the bill fails to maximize a distinct opportunity to accelerate deployment of broadband network facilities in the United States.

Finally, although the bill does take an initial step to address the issue of "network neutrality," we believe the approach does not go far enough. A growing number of mid-life and older Americans are online and rely on unfettered access to content and services on the Internet. We believe that the Internet should remain an open and innovative platform, and urge the members of this Committee to incorporate a more meaningful and enforceable network neutrality requirement in this bill.

Thank you for your consideration of our views. We look forward to working with the members of the Committee on crafting this important consumer telecommunications legislation. If you have any further questions, feel free to contact me, or have your staff call Debra Berlyn of our Federal Affairs staff at 434-3800.

Sincerely,

David P. Sloane
Sr. Managing Director
Government Relations and Advocacy

THE UNITED STATES CONFERENCE OF MAYORS

1620 EYE STREET, NORTHWEST
WASHINGTON, D.C. 20006
TELEPHONE (202) 293-7330
FAX (202) 293-2352
URL: www.usmayors.org

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Mayor of Richmond, VA
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Mayor of San Leandro
Executive Director:
TOM COCHRAN

January 25, 2006

The Honorable Ted Stevens
Chairman
Committee on Commerce, Science
and Transportation
The United States Senate
508 Dirksen Office Building
Washington, DC 20510

The Honorable Daniel Inouye
Ranking Member
Committee on Commerce, Science
and Transportation
The United States Senate
508 Dirksen Office Building
Washington, DC 20510

The Honorable Joe Barton
Chairman
Committee on Energy and Commerce
The U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable John D. Dingell
Ranking Member
Committee on Energy and Commerce
The U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Dear Committee Leaders:

On behalf of The United States Conference of Mayors and the hundreds of mayors we represent, we write to urge you to consider the following principles as you continue your deliberations on the rewrite of key sections of the federal Communications Act.

We support and encourage innovation in video, telephone and broadband services and embrace increased competition, as fast and as much as the market will sustain. However, as we convene this week in Washington, D.C. for our 74th Winter Meeting, our fundamental principle in the rewrite of the Communications Act is our responsibility to protect our citizens, local businesses, local infrastructure, and our local economy.

As you continue to debate the rewrite, we urge you to apply the following principles:

CLOSE THE DIGITAL DIVIDE
Ensure that broadband services, including those provided over a telco-cable system are made available to all residential subscribers in a reasonable period of time. This can only be done by banning "redlining", the practice of bypassing less profitable neighborhoods; and preserving the ability of franchise authorities to enforce reasonable "build out" requirements for providers.

AVOID FISCAL HARM TO LOCAL GOVERNMENTS
Any rewrite proposal should ensure consumers are paid a fair rent for use of their assets, the communities' rights-of-way. You may achieve this goal by doing no fiscal harm to local governments. Beware of proposals that claim to retain the full 5% franchise fee, but exclude traditional revenues such as advertising, and other non-subscriber revenues. Local governments need this revenue to support critical municipal services, including public safety, traffic management, and street and sidewalk preservation.

PRESERVE LOCAL GOVERNMENT'S MANAGEMENT OF THE RIGHTS-OF-WAY
Local governments have both state delegated and inherent police powers to manage and charge impact fees in addition to rent for the use of public rights-of-way. Local governments are proven stewards of the public rights-of-way, and are pivotal in helping to prevent public safety issues resulting from overcrowding and improper use; ensuring local emergency services are provided; as well as addressing customer service and local business concerns related to misuse of public rights-of-way. It is important that Congress respect local governments' property rights and interest in the management and control of the public rights-of-way.

MAINTAIN LOCAL GOVERNMENT'S FRANCHISE AGREEMENT AUTHORITY
Congress may ensure our citizens and businesses benefit from the rewrite of the Communications Act through preserving local franchising authority. Preserving local franchise authority ensures that key services for our citizens and businesses are tailored to meet local needs, including public, education and government access channels, local emergency alerts and institutional networks.

MAINTAIN SOCIAL OBLIGATIONS & PUBLIC SAFETY OBLIGATIONS OF THE PROVIDERS
Congress and the states have long recognized that social obligations, such as channel capacity, capitol grants and in-kind support for access channels should be imposed upon communication providers as part of the compensation required of a rights-of-way occupant. Similarly, institutional network grants and in-kind support serving non-residential buildings such as police and fire stations, schools, and libraries need to be retained. Maintenance of these social and public safety systems require continued obligations based on the current 3% average on top of the 5% franchise fee.

MUNICIPAL BROADBAND
Allow local governments that have determined in order to meet their community's needs they have decided to develop municipal broadband networks either through public-private partnerships or systems wholly owned by the municipality.

We look forward to working together to further secure America's future economic growth by offering citizens a modern communications infrastructure that includes the provision of broadband service and video by competing providers.

The United States Conference of Mayors would be pleased to supply additional information to further your assessment of these issues as you continue your deliberations on the rewrite of the Communications Act. For more information, please contact our Assistant Executive Director, Ron Thaniel, at 202-861-6711 or rthaniel@usmayors.org.

cc: The United States Senate
The United States House of Representatives

Sincerely,

City: Long Beach, Calif

City: Trenton, NJ

City: Camden, N.J.

City: Pembroke Pines FL

City: Richmond Calif

City:

City: Germantown TN

City: Bartlett, IL.

City: Mount Prospect, IL 6005

City: Macon, GA

City: Alameda, CA

City: Port St Lucie FL

City: Louisville Ky

City: Dearborn, MI

City: Elizabeth NJ

City: Santa Barbara, CA

City: Gary, IN

City: Clearwater FL.

City: Northbrook, IL.

City: Dallas, Texas

City: Piscataway N.J.

City: Beaumont, Texas

City: Fargo, N.D.

City: Pasadena, CA

City: Portland, OR

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January 25, 2006
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City: LAREDO, TX

City:

City: Arvada, CO

City: PORT ST LUCIE FL.

City: Anchorage, ALASKA

City: Walnut Creek, CA

City:

City: Folsom, CALIF.

City:

City: Albuquerque NM

City: Redondo Beach, CA

City:

City: BERKELEY, CA.

City:

City: PALATINE, IL

City: DENVER

City: Seattle

City: Thornton

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City:

City: Bradley Illinois

City: Bloomington, Illinois

City: Philadelphia, PA

City: Modesto CA.

City: Renton, WA.

City: ST. LOUIS, MO

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Joe Riley
City: Charleston SC

Thomas R. Miller
City: Franklin, TN

F. Scott Fosler
City: Hendersonville, TN

Dave Miller
City: Elkhart, IN

Mary Clare Higgins
City: Northampton MA

Joyce Stanley
City: Addison, IL

Eddie Perez
City: Hartford, CT

John Marks
City: Tallahassee, FL

Irvine, CA
City:

Carmel, IN.
City:

Euline Brock
City: Denton, TX

Bill Gaffney
City: Burlington, VT.

Oscar Goodman
City: Las Vegas, NV

City: Chattanooga, TN

Bill Haslam
City: Knoxville, TN.

City:

J. Allen James
City: Winston Salem, N.C.

Ron Gonzales
City: San Jose, CA.

City:

T. M. Franklin Cownie
City: Des Moines, IA

John Marks
City: Sacramento CA

Christopher Koos
City: Normal, IL

Manuel A. Diaz
City: Miami, FL

City: North Richland Hills, TX

Thomas M. Menino
City: Boston, Mass.

L. Douglas Wilder
City: Richmond, VA

City: Baltimore, MD

Continuation of Endorsing Mayors

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Mayor
San Francisco, CA

Bill White
Mayor
Houston, TX

Michael Moncrief
Mayor
Ft. Worth, TX

Roosevelt Dorn
Mayor
Inglewood, CA

Mark Mallory
Mayor
Cincinnati, OH

Joan McGilton
Mayor
Burien, WA

Steven Mullett
Mayor
Tukwila, WA

Miguel Pulido
Mayor
Santa Ana, CA

Linda Rouches
Mayor
Hood River, OR

Meyera E. Oberndorf
Mayor
Virginia Beach, VA

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Dearborn, MI - Michael A. Guido

Trenton, NJ - Doughlas H. Palmer

Anchorage, AK - Mark Begich

North Little Rock, AR - Patrick Henry Hayes

Alameda, CA - Beverly Johnson

Alhambra, CA - Steven T. Placido

Berkeley, CA - Tom Bates

Folsom, CA - Stephen Miklos

Inglewood, CA - Roosevelt Dorn

Irvine, CA - Beth Krom

Modesto, CA - James Ridenour

Pasadena, CA - Bill Bogaard

Redondo Beach, CA - Mike Gin

Richmond, CA - Irma L. Anderson

San Francisco, CA - Gavin Newsom

San Jose, CA - Ron Gonzales

San Leandro, CA - Shelia Young

Santa Ana, CA - Miguel Pulido

Santa Barbara, CA - Marty Blum

Walnut Creek, CA - Kathy Hicks

City, State - Mayor
Denver, CO - John W. Hickenlooper

Thornton, CO - Noel I. Busck

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Hallandale Beach, FL - Joy Cooper

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NorthBrook, IL - Eugene Marks

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Bowling Green, KY - Elaine Walker

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St. Louis, MO - Francis Slay

Winston Salem, NC - Allen Joines

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Piscataway, NJ - Brian C. Wahler

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Portland, OR - Tom Potter

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Franklin, TN - Thomas Miller

Germantown, TN - Sharon Goldsworthy

Hendersonville, TN - Scott Foster

Knoxville, TN - Bill Haslam

Beaumont, TX - Guy M. Goodson

Dallas, TX - Laura Miller

Denton, TX - Euline Brock

Fort Worth, TX - Michael Moncreif

Houston, TX - Bill White

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North Richland Hills, TX - Oscar Trevino

Richmond, VA - L. Douglas Wilder

Virginia Beach, VA – Meyera E. Oberndorf

Burlington, VT - Peter Clavelle

Burien, WA - Joan McGilton

Renton, WA - Kathy Keolker-Wheeler

Seattle, WA - Greg Nickels

Tukwila, WA - Steven Mullett

MR. MARKEY. Mr. Citron, just one quick question so we can get it on the record. Is it technically and operationally feasible for Vonage to provide enhanced 911 service today?

MR. CITRON. Yes, when the underlying PSAP allows us to test at inner camp. As I testified earlier to, PSAP where the clause would actually be entered by, have said we will not take your call unless you have liability parity. And without that, it is absolutely completely impossible. I would call that operationally impossible, although I admit, it is not all operational difficulty, it is the operation difficulty of the PSAP.

MR. MARKEY. Is it technically and operationally feasible for Vonage to offer just 911 service today?

MR. CITRON. It would be the same problem with the PSAP. The PSAP will not take a phone call from Vonage, as specified in a letter to this committee by NENA, the National Emergency Numbering Association, which specifies that their members will not take our calls without liability parity.

MR. MARKEY. Okay, thank you.

MR. CITRON. You are welcome.

MR. UPTON. Five hours and 25 minutes, you are now excused. Thank you, and I hope you make your flights. I appreciate your testimony today. We are going to take a four- or five-minute break, to get prepared for the second panel to step up.

[Break.]

MR. UPTON. We are ready to start the second panel. We thank you for your indulgence. We sort of knew that it was going to go long, the first panel. And I understand that Ms. Rodriguez-Lopez has an important phone call to make at 4:15. So we will let you, at the proper time slip away, as long as you promise to return, which I know you will. We are joined by Ms Lillian Rodriguez-Lopez, President of the Hispanic Federation; Ms. Julia Johnson, Chairwoman of the Video Access Alliance; Mr. Anthony Thomas Riddle, Executive Director of Alliance for Community Media; Ms. Jeannine Kenney, Senior Policy Analyst for the Consumers Union; Mr. Randolph May, Senior Fellow and Director of Communications Policy Studies for The Progress and Freedom Foundation; and Mr. James Makawa--

MR. MAKAWA. Makawa.

MR. UPTON. Makawa, I am sorry. Co-Founder and CEO of The Africa Channel. Welcome all of you. And we will try to limit your presentation to no more than five minutes. Your testimony is part of the record in its entirety. Ms. Rodriguez-Lopez, welcome, we will start with you. You just need to press the button.

STATEMENTS OF LILLIAN RODRIQUEZ-LOPEZ, PRESIDENT, HISPANIC FEDERATION; JULIA JOHNSON, CHAIRMAN, VIDEO ACCESS ALLIANCE; ANTHONY THOMAS RIDDLE, EXECUTIVE DIRECTOR, ALLIANCE FOR COMMUNITY MEDIA; JEANNINE KENNEY, SENIOR POLICY ANALYST, CONSUMERS UNION; RANDOLPH J. MAY, SENIOR FELLOW AND DIRECTOR, COMMUNICATIONS POLICY STUDIES, THE PROGRESS & FREEDOM FOUNDATION; AND JAMES MAKAWA, CO-FOUNDER AND CHIEF EXECUTIVE OFFICER, THE AFRICA CHANNEL

MS. RODRIGUEZ-LOPEZ. Thank you, I pressed the button. Thank you, Mr. Chairman and members of the committee. I want to really tell you how appreciative I am and thankful for you inviting me to testify here today on behalf of the Hispanic Federation, a human service organization serving over one million Hispanic Americans. I am also a co-chair of Broadband Everywhere, a coalition of voices, supported by the American Cable Association and NCTA, that is focused on public polices that promote broadband deployment to every neighborhood in America.

I have met and discussed this issue with intelligent people representing both industries in an effort to better understand the implications of a Federal broadband bill. I feel it is important, very important to make clear from the outset that I am not anti-Bell. I clearly support their entry into the market given the possibility of additional competition and programming in the video marketplace. I think all the industries--cable, telephone and other technology industries--have offered a lot to this country, and at the end of the day, must all work together.

But I am here today to echo the position of many leading Hispanic civic organizations across the country--the position that any franchising reform legislation must contain provision that guarantee us a reasonable and equitable deployment in Hispanic communities. And the question is, will the current legislation bring broadband competition to our neighborhoods in this equitable and reasonable way? That is the central question for me, and the focus of my work in this area.

And I would pose a central question for this body. Today, only one in eight Latino households has broadband services. So the stakes are high. Thus, any video franchising reform legislation must ensure that Hispanic communities get access to the latest technologies as fast as other communities. Nothing more, and nothing less.

I want to state that for starters, the rationale for sweeping Federal legislative reform has yet to be proven. I believe that through the involvement of municipal and State governments, we can arrive at solutions that speed entry into the market while ensuring that every neighborhood sees the benefits of broadband and video competition. On average, there are three to four cable and satellite competitors in most markets today. And as I have learned by receiving information from the telecom companies, it seems that most new entrants get franchises relatively quickly. We can make a judgment as to whether 30, 60, 90, or 120 days is quick. But given other things that happen in this country and how we have to wait for processes to kind of unravel, it seems reasonable.

But if we are going to deregulate new entrants into the video services industry, we must have meaningful non-discrimination provisions. Therefore, I urge the committee to include provisions that require all providers, new and existing, to make available their latest broadband and digital services to all communities within a particular service footprint, regardless of an area's income, within a reasonable time period.

Just one example, in Dallas, Texas a limited non-discrimination provision as some have proposed, that allows a provider to limit deployment only to areas self-selected by new providers, would mean that a new provider could provide these services only to Park Cities, while potentially writing off, or delaying for a significant number of years service to the largely Hispanic Arcadia Park, so long as it didn't discriminate within Park Cities.

In my home state of New Jersey, I and other Hispanic leaders insist that we--I apologize, I am slightly nervous. I and other Hispanic leaders want to see a deployment that includes a significant number of low-income, urban, rural, and minority communities in a reasonable timeframe. I am not naïve. I do understand that deployment must occur in stages, and that certain priorities will be established. But at the same time, we need to maintain a legal system that protects the critical role of local governments in ensuring that historically under-served communities are guaranteed access to the latest broadband video services within a reasonable and enforceable time period. Both the telecom and cable industries must continuously work to erase the digital divide that afflicts both under-served and middle class communities.

And Congress must support policies and laws that serve to close the digital divide and promote American competitiveness and productivity. Only with policies that address those two priorities can the Hispanic community truly benefit. So the access test of any meaningful reform legislation is that it protects the access to the latest broadband technologies for the greatest number of Americans, including our poor,

urban, and minority communities, within a provider's entire service footprint.

And finally, non-discrimination provisions must have teeth. Indeed, the old saying that a right without a remedy is no right at all, is clearly applicable here. Federal and State enforcement authorities must therefore have the explicit authority to revoke licenses of any telecom or cable provider that discriminates in the provision of new advanced broadband and video services. I believe that Congress can pass legislation that will reform the process without doing damage to protections that have been in place for nearly 20 years, and would serve as the only meaningful national broadband policy in place today. But video franchising legislation without these protections and oversight will set our communities back decades in an age of information technology, and global competition where none of us, least of all Hispanic Americans, has a moment to lose.

Thank you so much, Mr. Chairman.

[The prepared statement of Lillian Rodriguez-Lopez follows:]

PREPARED STATEMENT OF LILLIAN RODRIGUEZ-LOPEZ, PRESIDENT, HISPANIC FEDERATION

Mr. Chairman, members of the Committee, I want to thank you for inviting me to testify here today on behalf of the Hispanic Federation, a human service organization serving over 1 million Hispanic Americans. I am also a co-chair of Broadband Everywhere, a coalition of voices, supported by the American Cable Association and NCTA, that is focused on public policies that promote broadband deployment to every neighborhood in America.

I have met and discussed this issue with intelligent people representing both industries in an effort to better understand the implications of a federal broadband bill. I feel it's important to make clear from the outset that I am not anti-Bell. I clearly support their entry into the market given the possibility of additional competition and programming in the video marketplace. I think the cable, telephone and other technology industries have offered a lot to this country and, at the end of the day, must all work together.

But I am here today to echo the position of many leading Hispanic civic organizations across the country – the position that any franchising reform legislation must contain provisions that guarantee us a reasonable and equitable deployment in Hispanic communities. Will the current legislation bring broadband competition to our neighborhoods in an equitable and reasonable deployment? That is the central question for me, and the focus of my work in this area.

Today, only one in eight Latino households has broadband services, so the stakes are high. Thus any video franchising reform legislation must ensure that Hispanic communities get access to the latest broadband technologies as fast as other communities. Nothing more, and nothing less.

For starters, the rationale for sweeping federal legislative reform has yet to be proven. I believe that, through the involvement of municipal and state governments, we can arrive at solutions that speed entry into the video market while ensuring that every neighborhood sees the benefits of broadband and video competition. On average, there are three to four cable and satellite competitors in most markets today. As I have learned, new entrants seem to get franchises relatively quickly.

But if we are going to deregulate new entrants into the video services industry, we must have meaningful non-discrimination provisions. Therefore, I urge that the Committee include provisions that require *all* providers – new and existing – to make available their latest broadband and digital services to *all* communities within their service footprint, regardless of an area's income, within a reasonable time period.

For example, in Dallas Texas, a limited non-discrimination provision, as some have proposed, that allows a provider to limit deployment only to areas self-selected by new providers would mean that a new provider could provide new video services only to Park Cities while potentially writing off, or delaying for many, many years, service to the largely- Hispanic Arcadia Park, so long as it didn't discriminate within Park Cities! In Detroit, this kind of limited non-discrimination provision would mean that a service provider would first bring service to wealthier communities such as Bloomfield Hills while totally ignoring or intolerably delaying deployment to Dearborn Heights and Detroit, so long as the provider did not discriminate within Bloomfield Hills!

In my home state of New Jersey, I and other Hispanic leaders insist that we see deployment that includes a significant number of low-income, urban, and minority communities in a reasonable timeframe. I am not naïve. I do understand that deployment must occur in stages and that certain priorities will be established. But, at the same time, we need to maintain a legal system that protects the critical role of local governments in ensuring that historically underserved communities are guaranteed access to the latest broadband and video services within a reasonable and enforceable time period. Both the telecom and cable industries must continuously work to erase the digital divide that afflicts both underserved and middle class communities. And Congress must support policies and laws that serve to close the digital divide and promote American competitiveness and productivity. Only with policies that address those two priorities can the Hispanic community truly benefit.

Thus, the *acid test* of any meaningful reform legislation is that it protects the access to the latest broadband technologies for the greatest number of Americans, including the poor, urban and minority communities within a provider's entire service footprint.

Finally, non-discrimination provisions must have teeth. Indeed, the old saying that "a right without a remedy is no right at all" is clearly applicable here. Federal and state enforcement authorities must therefore have the explicit authority to revoke licenses of any telecom or cable provider that impermissibly discriminates in the provision of new advanced broadband and video services.

I believe that Congress can pass legislation that will reform the process without doing damage to protections that have been in place for nearly 20 years, and which serve as the only meaningful national broadband policy in place today. But video franchising legislation without enforceable protections and oversight will set our communities back decades in an age of information technology and global competition where none of us – least of all Hispanic Americans -- has a moment to lose.

MR. UPTON. Ms. Johnson?

MS. JOHNSON. Thank you, Mr. Chairman and members of the committee. The invitation today to speak to you regarding video reform is an honor. The last time I had the opportunity to speak with many of you was about ten years ago, in my capacity as the Chair of the floor at a Public Service Commission. At that point, we were considering the 1996 Act. I say that in a twisted way, this proceeding is a celebration of your success. I know that you may be feeling like victims of your own success. But Congressman Stearns said it well, when he spoke of the progress that this Nation has made under the leadership, our Federal

leadership in implementing laws that allowed for the continued advanced communications development in information innovation, and infrastructure. Rapid introduction of video competition epitomizes that continued success.

Allow me to tell you a bit about the Video Access Alliance. We are a not-for-profit organization dedicated to promoting policies that encourage rapid deployment of innovative new video platforms. We serve as an advocacy and advisory group for independent, emerging and minority networks, content providers, programmers, entertainers, and industry participants. We are not against cable. We are not against the telephone companies. Unfortunately for consumers, much of the current debate has turned on a cable versus telecom fight. Much of the dialogue has focused on the policies and the benefits of competitors. We firmly believe that the focus should consistently, and relentlessly, be on the benefits to consumers. The Alliance is focused on ensuring that there are multiple platforms for the distribution and expansion of more robust content, at lower prices for Americans, and our everyday consumers.

Allow me to elaborate. Creating an environment that allows for rapid investment and deployment in new video platforms will have a compounding consumer benefit. That is to say, competition will lead to the underlying video distribution providers offering lower prices for that carriage. Additionally with competition, there will be a need for networks to distinguish their offerings, which will allow for more diverse and higher quality content. Furthermore, competition and programming in the content space will lead to more competitively priced programming, providing independent channels entering the market, and that will allow for downward pressures on affiliate channels. The results will be extraordinary savings for consumers, higher quality programming, and greater choice for all consumers.

We all recognize that the current market environment denies these full benefits to consumers. The facts are undeniable. Independent networks as a group are summarily excluded under the current structure. Recent research indicates that under the current market structure, the top video distribution networks carried on a non-premium national basis is less than one percent of channels with no media affiliation.

The only way to ensure diversity of information sources, lower prices for cable TV, higher quality programming, and more consumer choice is to create an environment that allows for rapid deployment of more platforms with greater choice. We believe that new choice and programming is just one of the benefits of reforming our video franchise laws. Equally important to minority communities is that, and to the minority communities that our coalition members serve, are the technological advances and increased capabilities that competition will

create. As a great number of our members are minorities, or are focused on minority markets, the issue of availability of these offerings to our community is tremendously important to us.

The Alliance believes that the best way to ensure networks are built and are available to all is to allow the markets to work. Giving minority consumers enormous buying power, minority consumers will be particularly attractive to all providers in the video distribution marketplace. Minority consumers have been shown in recent studies to spend more on media products and services than other demographics. We over indexed in each category. We support the comments made earlier by Congressman Rush, as he talked about the need for anti-discriminatory standards and enforcement mechanisms. We look forward to working with you in those endeavors.

I applaud you again for your efforts, and I ask that you continue to make video franchise reform a priority this year. Thank you.

[The prepared statement of Julia Johnson follows:]

PREPARED STATEMENT OF JULIA JOHNSON, CHAIRMAN, VIDEO ACCESS ALLIANCE

Good morning Mr. Chairman and members of the committee. Thank you for your invitation. I am Julia Johnson, Chairperson of the Video Access Alliance. I am honored today for this opportunity to speak to you about video franchise reform. We applaud your leadership and action in working on this very important issue.

First I would like to tell you briefly about the Video Access Alliance. We are a not-for-profit organization dedicated to promoting policies that encourage rapid deployment of innovative new video platforms. We serve as an advocacy and advisory group for independent, emerging and minority networks, content providers, programmers, entertainers and other industry participants. We believe that as more platforms with greater capacity to carry programming are deployed, our independent and innovative voices—minority in particular—can be heard. Our coalition consists of entrepreneurs and executives from several different independent networks including ImaginAsian TV, MultiChannel Ventures, The Employment & Career Channel, The America Channel, and the Black Television News Channel, LLC.

We are on the consumer's side. We are on the entrepreneur's side. We are on the side of economic development for our communities. We believe that all consumers, particularly minorities, have the most to gain from expanded video platforms.

We are not against cable. We are not against telephone companies. Unfortunately for consumers, much of the current debate has turned into a cable versus telecom fight. Much of the dialogue has focused on polices that benefit competitors; we firmly believe the focus should consistently and relentlessly be on the benefits to consumers.

The Alliance is focused on ensuring that there are multiple platforms for the distribution of expanded and more robust content at lower prices for America's everyday consumers.

We believe that consumers deserve more choices for their TV and entertainment services. We strongly support the need for more video distribution systems and encourage the use of advanced digital technologies and broadband deployment into communities to bring consumers innovative options.

We support greater competition in the video delivery market—and we're hopeful this legislation will do just that. We would like to see telecommunications companies

expand their video networks as quickly as possible. We'd like to see the cable companies expand their networks as quickly as possible. Doing so could serve as an extraordinary opportunity for minorities and other entrepreneurs. And we again applaud the committees' efforts in working to do so.

Competition **will** super-charge the video delivery market and have a favorable economic impact on our economy. In a competitive and open market, video distribution networks will provide more opportunities for independent programmers to distinguish their service from their competitors. This will lead to greater content choice for consumers. The FCC found that cable television providers offer at least 6 percent fewer programs in the absence of competition. The mere presence of competing providers would give independent networks—like my members—more opportunities and give consumers greater choice. In fact, already we're seeing new channels come online and programmers reach new audiences—we need to accelerate that process.

We believe that new choice in programming is just one benefit of reforming our video franchise laws. Equally important to the minority communities that many of our coalition members serve are the technological advances and increased capacity that competition would undoubtedly create. When competing companies vie over customers, they create a storm of innovation. We strongly believe that innovation, open markets and fair competition will encourage investment in infrastructure that will allow for the new applications and distribution models. These applications, many of which have yet to be invented, will bring opportunities like distance education, global commerce and telemedicine closer to all consumers. These are innovations that can truly change lives.

Ultimately video franchise reform will provide the incentives for new networks with capacity that we can't even envision today.

As a great number of our members are minorities or focus on minority markets, the issue of availability of these new offerings is of tremendous importance to our supporters.

We have a unique interest—both socially and economically—to ensure that consumers have access to all the amazing innovations video franchise reform will bring.

We believe that the best way to ensure networks are built and available to all is to **let the markets work**. Given minority consumers' enormous buying power, we firmly believe that minority consumers will be particularly attractive to all providers in the video distribution marketplace.

Minority consumers have been shown in recent studies to spend more on media products and services than other demographics. According to a study by Horowitz Associates, minorities are the top subscribers to premium channels and have higher penetration rates for digital television.

A market-driven solution, as proposed in the legislation, is the best solution to ensure all consumers benefit from video franchise reform.

In sum, the more choices consumers have the better. We believe that expanded video distribution networks will result in lower consumer prices, higher quality consumer programming and greater consumer choice. Moreover, we know that with this expansion come greater opportunities for independent, minority and emerging networks to be distributed into all communities.

I again applaud your efforts and ask that you continue to make video franchise reform a priority this year.

Thank you for inviting me to testify today and I would be happy to answer any questions you may have.

MR. UPTON. Thank you. Mr. Riddle?

MR. RIDDLE. I thank you, Chairman Upton. I would also like to thank--

MR. UPTON. Is that mic button on, just make sure.

MR. RIDDLE. --the entire committee for having us here, the sub-committee, and I would also like to give out a special thanks to staff who have spent a lot of time with us over the past few months working with you.

I represent the Alliance for Community Media, which for 30 years has represented the interest of the public educational and government access community in the United States. The Alliance members are localism in action, but we are tied to two communities, both civic and corporate.

First, we represent 3,000 channels, 250,000 organizations, 1.2 million volunteers that use those channels every year. We are the local election debate. We are participants in the local budget process. We are the town council meeting and the land-use hearing. We are tens of thousands of religious organizations, which find their only outlet on PEG channels. We are you. Many of your colleagues use our channels frequently to get their message out to the community on an unfiltered basis. But we are equally bound to the visionary pioneers of science and industry who have created a bridge work of light, sound, data, and dreams that can connect communities of like spirited people. We are bound to the economic success of giant corporations who vie to deliver our dreams, and to the freedom of millions of small innovators who blaze a trail to the future.

We would like to thank you for the wonderful work that has been done on this bill. There are many things that we can be thankful for that are in the bill, namely, the interconnection language that governs interconnection between the PEG facilities and the new providers. If that wasn't there, then there would be the possibility that new providers would actually be a source of extra expenditure to the PEG community.

We appreciate the language around marketing and promotion. And we particularly are pleased to see that there is funding for PEG based on gross revenues. The one percent funding for PEG is a good first step. We have some members which will not be made whole by that because they do have agreements that were previously created that exceed the one percent. But we are glad to see that we have moved in this direction.

Some of those benefits that our members have are the result of processes that included a community-wide public needs assessment, and numerous public meetings. And we ask that such an engaging political process be supported by grandfathering of agreements that were derived from that.

There would be some difficulty in smaller towns and rural areas, or other communities that have opted to devote more resources to PEG. There is a level of funding below which the doors just don't open. For this reason, the Alliance has prepared a sliding scale national standard for

funding large and small communities. PEG support would be paid to the municipality on an inverse basis according to gross revenues. That is just a way of saying that if you have a very small community with very low gross revenues, the one percent might not make it, although it would be very useful in a large community like New York. The national standard sliding scales distribute resources according to local community needs.

We ask that the franchise fee revenue base not be reduced, and we are in complete agreement with the League of Cities and the Cities Group on this matter. We think it is a good idea that new video competitors match the existing number of PEG channels in most cases. It saves negotiation time and offers a level playing field. There are a few suggestions we would make though. The language of the bill covers two cases of channels, and those of the existing incumbent and those where there is no incumbent, and therefore no channels. But it doesn't cover the situation where there is an incumbent but no channels, and offers no ability to negotiate for those channels in the future. So we would like to direct the subcommittee to look at the standards that we suggest for use in those communities where there are currently no PEG channels. Our suggested national standard for PEG channel capacity uses a bell curve, in which the vast majority of systems would have four PEG channels. The needs of both smaller and large communities are met by a balanced market based test.

We ask Congress to either adopt such standards or ask that the FCC consider the Alliance's national standard sliding scale in any proposed rulemaking on PEG channel capacity. The Alliance also feels that there must be clear language governing IPTV and how that affects channel capacity and funding. Fixing PEG at a reasonable percentage of bandwidth based on current channel allotments, eliminates this tendency to redefine PEG out of existence and prevents PEG capacity from being reduced.

A brief word on network neutrality. We do have at least a passing interest in this, since we expect that most of the PEG channels will be within the IPTV, or the Internet part of the bandwidth at some point. And we don't want to be left behind in a slower part of that system. We do have an interest in stronger language on build-out or redlining, although we don't have technical ideas on how that should be done. But our interest is that nobody be left out of the kinds of conversations that PEG offers, and those folks that are not receiving the services will not be able to participate.

And I would just point to one quick piece on the Texas legislation and an unintended consequence that happened in San Antonio where the franchise ran out about the same time as the law went into effect. And

there was unintended consequence of the PEG channels going dark immediately. We would like to see the language in your bill constitute a minimum below which State laws could not drop.

And you know again, we would like to recognize the hard work that has brought us to this point. We reaffirm our permanent relationship with the big cities and the small towns in which we live, and the governments, including the Congress, which we as free people have chosen to represent our interests. We hope you will continue this conversation with us, as we together design not a television system, but a brave new world.

We welcome your comments and questions.

[The prepared statement of Anthony Thomas Riddle follows:]

PREPARED STATEMENT OF ANTHONY THOMAS RIDDLE, EXECUTIVE DIRECTOR, ALLIANCE FOR COMMUNITY MEDIA

Good morning, my name is Anthony Riddle, Executive Director of the Alliance for Community Media. The Alliance represents over 3,000 Public, Educational, and Government (PEG) Access centers across the country. On behalf of our members, and millions of community television producers and viewers, we thank Chairman Upton and the members of this subcommittee for inviting the Alliance to speak with you today on this important topic.

Before getting to the substance of our remarks, we want to express our appreciation to this subcommittee and staff for their genuine attention and consideration of our views. Candidly, there were many in our organization who expressed serious doubts that our voices would be heard in this debate. However, I can assure our members and advocates that we were treated with respect, and that HR____ reflects a sincere effort to address our key issues.

Now, for the rest of the story. Alliance members are localism in action. We are tied to two communities: Civic and corporate. We are 3000 channels, the 250,000 organizations, the 1.2 million volunteers that use those channels every year. We are the local election debate. We are participants in local budget processes. We are the town council meeting, the land-use hearing. We are the tens of thousands of religious organizations which find their only outlet on PEG channels—represented by these hundreds letters of support here in my hand.

We are you—the tremendous number of Members of Congress who have used the PEG channels to speak directly to your constituents. We love being a part of that process of community, no matter how difficult it may sometimes be. This civic process that roots us into the places we call home.

We are equally bound to the visionary pioneers of science and industry who have created a bridgework of light, sound, data and dreams they can connect communities of like-spirited people--unbound by geographic limitations. As we are partners in the noisy politics of budget and

community, so are we also bound to the economic successes of giant corporations who vie to deliver our dreams and to the freedom of millions of small innovators who blaze a trail to the future. Imagine the wonder of our ancestors had they witnessed the unlimited potential for democratic media before us now.

The Alliance recognizes the hard work that has brought us to this point. Much is at stake and there are many stakeholders. The current legislative proposal has evolved from countless conversations among many parties. There is much to be thankful for in the current draft. We find ourselves presented with opportunities for further conversation.

Interconnection

The Alliance rates the language on interconnection as excellent. Without such language, many PEG centers would see their funding quickly dissipate as they would have to pay the additional expense of connecting to new providers. Some would be left to choose which provider to connect with and which not. We are also pleased that a mechanism is provided for cost saving arrangements between providers that do not hurt the PEG facilities.

Marketing and Promotion

The Alliance very much appreciates the attention being given to comparability of listings, identifications and accessibility for PEG programming. Diverse local communities find their own voices through access to media. As unique reflections of diverse communities, PEG access TV channels must be easily located and accessed by viewers. Channels should not be moved without the permission of the PEG entity. Local channels should be on the same numerical locations between operators in the same franchise area.

PEG Support

We are pleased to see that there is funding for PEG based on gross revenues. This ties PEG funding to the market forces that drive pricing and subscribership. It also eliminates the need for future adjustment of PEG support. The franchise provision which allow for this are usually the result of a process that included a community-wide public needs assessment and numerous public meetings involving hundreds of citizens. The resulting franchise is then supported by the local government, the cable company, the public schools and many of community's major civic organizations.

- Such an engaging political process ought to be supported by grandfathering of the agreements derived from them.

One percent PEG support above the franchise fee is a strong step in the right direction. It will leave many but, unfortunately, not all of our members whole. Where there would difficulty is in the smaller towns and rural areas or other community that have opted to devote more resources to PEG. There is a level of funding below which the doors just don't open. For this reason, the Alliance has prepared a sliding-scale National Standard for funding large and small communities.

PEG support would be paid to the municipality on an inverse basis according to gross revenues. Smaller communities generally need fewer absolute dollars to operate PEG, but those amounts will constitute a slightly larger percentage of gross revenue. Conversely, larger communities need more PEG support—but less as a percentage of gross revenue. Finally, we would like to see that funding freed, so that communities can determine locally what mix of capital and operating expenditures best meets local needs.

- The attached National Standard sliding scales distribute resources according to local community needs.
- Conforming language on funding is attached to these comments.

Franchise Fee Revenue Base Should Not Be Reduced A reduced franchise fee revenue base would reduce LFA financial support for PEG. The Alliance supports the recommendations of Mayor Fellman and the local government organizations on this matter.

PEG CHANNEL CAPACITY

We think it is a good idea that new video competitors match the existing number of PEG channels in most cases. It saves negotiation time and offers a level playing field. There are a number of adjustments we would suggest.

Communities Without PEG Capacity The bill contemplates communities without cable operators being able to establish PEG with national franchisees by pursuant to rule-making by the FCC. This is a good idea. We would go further and suggest that the FCC rule-making establish a minimum to be followed also in those communities that do have a cable operator but which do not now have PEG channels. This is sometimes the case in smaller communities that did not have the expertise or wherewithal to negotiate for them under older franchises. We can pump oxygen into these needy communities! No one wants to see innovation, development or democracy permanently stifled in underserved areas—often rural and smaller cities and towns with few other media resources.

The relative per subscriber amount of financial support needed to operate PEG *decreases* as the system size increases. However, the amount of bandwidth necessary to serve community needs *increases* with the number of subscribers:

- A system of 10,000 subscribers may be served adequately with two or three PEG channels out of 72 analog channels, or about 4%.
- In Manhattan/New York City with 500,000+ subscribers, community needs are barely met with nine analog PEG channels of a 72 channel system at the time of franchise.

Our suggested National Standard for PEG channel capacity for uses a bell-curve in which the vast majority of systems would have four PEG channels. The needs of both smaller and larger communities are met by balanced, market-based tests.

- We ask Congress to either adopt such standards or, ask that the FCC consider the Alliance's National Standard sliding-scale in any proposed rule-making on PEG channel capacity.

IPTV AS CABLE SERVICE

The Alliance feels that we must be crystal clear that so called "IPTV" type services are subject to the terms of the national franchising model and that there is no "escape hatch" for new entrants to exercise. In particular, we would be greatly concerned if this question were left open to interpretation by the Federal Communications Commission. Without this assurance, we feel new entrants would take advantage of this loophole and render the balance of HR____ essentially meaningless. From our perspective, this is a fundamental requirement for a balanced and equitable bill.

A Word On Percentages Any channel capacity system needs protection from migration of video services to the information services silo. As technology moves forward, there will be market pressure to satisfy PEG requirements with fewer bandwidth resources by not passing along the advantages of innovation. This is often already the case. The number of PEG channels generally remains fixed at old levels even as digital technology provides ten times as many channels in the same space. The digital channels often involve new capabilities for commercial programmers not offered to community programmers.

Fixing PEG at a reasonable percentage of bandwidth based on current channel allotments eliminates this tendency and prevents PEG capacity from being *redefined* out of existence. More importantly, it eliminates regulatory language that might arbitrarily favor one use of technology over another.

- *The use of bandwidth percentages allows a community to align itself with the most current, innovative technology a new system provides while* ***eliminating the need to ever redefine public interest capacity*** *obligations. Within this framework, communities will be able to evolve resources that are comparable in basic function and accessibility to those of other system users for years to come.*

Will the Internet Replace Television?

We do not believe that the internet and television are in opposition. They are different forms of delivery of different, similar or identical content. Ultimately, there must still be a provider of the programming and, in the case of PEG, a community process by which that programming is developed. Further, each programmer becomes associated with a particular type of programming—which is how the public knows where to look and what to expect. CNN is a programmer which uses "channels", radio, internet streaming, newspaper articles, Podcasts and other means of reaching the

audience—all according to which is most appropriate at the time and place. PEG communities should be expected to do the same.

In reality, accessibility is still a major issue governing which communities can use which forms today. According to Craig Moffet of Bernstein Research as part of his testimony at the

Senate Commerce Committee on net Neutrality: "Despite a great deal of arm waving from "visionaries", our telecommunications infrastructure is woefully unprepared for widespread delivery of advanced services, especially video, over the Internet. Downloading a single half hour TV show on the web consumes more bandwidth than does receiving 200 emails a day for a full year. Downloading a single high definition movie consumes more bandwidth than does the downloading of 35,000 web pages: it's the equivalent of downloading 2,300 songs over Apple's iTunes web site. Today's networks simply aren't scaled for that.."

And they won't be for some time to come. Virtual communities served by the Internet cannot replace real communities served by local channels.

Network Neutrality

Recently, we were given a demonstration of a newly designed cable system for video delivery. Its system of delivery is via the internet. The signal to the home is via twisted pair in some areas. More importantly, the signal from PEG to the provider is across the internet via T-1 line. Our channel signal to the video provider is to be carried across the open internet.

What does this have to do with network neutrality? When your community channel is on the information superhighway with all the other voice, data and video signals, the community channels will be lined up at a toll-booth while the Disney Channel is waved through at high speed. This will

leave smaller providers—PEG channels, the public at large and the small, innovative companies who have really made the internet what it is—with grainy picture, undependable or slow delivery and virtual invisibility.

With so little funding for equipment, staff or production, our member PEG stations across the country have done an admirable job serving the community. The one thing that has never been an issue is signal carriage. In theory, all PEG channels had to be carried on an equal basis with commercial channels. One could not buy special status. One could not pay to have another's channel dimmed. Channels, on the most basic level, had to rise or fall on the content of their own character. They should not have to rise or fall according to the content of the community's bank account.

Citizenship and Access to Broadband Communications

The Alliance has an interest in inclusion of stronger language on build-out, redlining or other such non-discriminatory provisions, however they are termed. Any new legislation should anticipate inevitable market imbalances and should have tests for identifying those imbalances. Legislation should provide concrete methods to bring comparability of price and service to all communities. PEG is dialogue, not a monologue. PEG is devalued by the absence of any community at the table. To the degree that PEG represents a democratic process, the absence of any segment of our society is a critical problem, the solution to which is one of the primary responsibilities of good government.

Municipal Communications Systems

The Alliance appreciates that the committee created a reasonable standard for municipal communications systems. Private investors are reasonably protected. The potential of municipal entry can be a positive market force, particularly in those areas that, for whatever reason, have

inadequate competition. Municipal entry also provides an opportunity for remedy in areas where there is inadequate service or perceived lower profitability.

Transition Time Needed

At the time of enactment of the Texas franchising legislation, the local cable company was in renegotiation with San Antonio. When the existing franchise expired, the cable company broke off franchise renewal negotiations, applied for and received a state-wide franchise. They announced with little warning that they would no longer provide the studio, staffing or other in-kind support for Public Access that had been required under the local franchise, but which was not required under the new state-wide franchise. This had the immediate result of diminishing the resources of the people who owned the Public Rights of Way. However, the effects of this state-wide franchise, unintended by the statute's authors, went much further. In the few days between the announcement of the change and its implementation by the cable company, the City was unable to acquire equipment, allocate funding and put the equipment in place. The channel went dark. The cable company then invoked fallow time provisions which allowed them to take the channel back for their own programming use. The City of San Antonio and its citizens are forced to patch together enough production resources to program the minimum number of hours required under the state franchise law just to regain the channel they had operated for years.

The law was intended to keep existing PEG resources whole. It was intended to allow those without PEG resources a reasonable process to secure them. Its very first implementation led to a loss of existing resources, both financial and channel capacity.

The law must provide a transition mechanism to prevent unintentional loss of PEG services.

State and Federal Laws

We would like to see clear language that Federal PEG minimums supersede state and local laws or ordinances that would not allow these minimums to be achieved. In this way, we can avoid a bidding war between states in which the broader public interest is traded out for higher placement on a provider's service roll-out calendar.

Conclusion

The Alliance for Community Media recognizes the hard work that has brought us to this point. We want to see competition and innovation. We want to see greater access for our children to the tools which will do much to determine what their potentials are as human beings. We reaffirm our relationship to you, the Congress which, in great foresight, protected the public interest in this great new communications system. We reaffirm our permanent relationship with the big cities and the small towns in which we live and to the governments which we , as free people, have chosen to represent our interests.

We hope that you will continue this conversation with us as we, together, design, not a television system, but a brave new world. We welcome your questions and comments

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Alliance for Community Media Position Paper:

A Simplified Approach to PEG Support in a Competitive Environment

The Alliance believes that competition and community are not contradictory. The community benefits from access to an innovative and competitive system. While we want competitors to enter the market quickly, we are interested in making sure that the community resources provided in exchange for use of the PROW are protected long-term and that they continue to support the development of local culture and services.

While we believe that local negotiations remain the best way to both achieve long-term stability and encourage local character, we have developed a simplified approach to national Public, Educational and Government television funding and capacity.

Three core ideas are at the basis of this narrowly focused discussion:

- **Standardized PEG Funding.**
- **Standardized PEG Channel Capacity.**
- **Federal Minimums Supersede State Laws.**

Our purpose is to propose a structure to secure PEG resources *if* local negotiation is eliminated. Federal standards can be established which recognize the differences between community needs based on size, resulting in the following benefits:

- Video Providers can plan on clear, fixed cost structures.
- Cities can customize community development based upon predetermined resources.
- The cost, time and uncertainty of negotiation are eliminated.
- Both channel capacity and PEG support are determined by the market elements of revenue and subscriber base.

Scalability of Fees

PEG support above 5% is paid to the municipality on an inverse basis according to gross revenues. This support is above 5% and may be used in support of PEG capital or operating expenses. It can be used for capital improvements or operating expenses.

Smaller communities generally need fewer absolute dollars to operate PEG, but those amounts will constitute a slightly larger percentage of gross revenue. Conversely, larger communities need more PEG support—but less as a percentage of gross revenue. The following sliding scales distribute resources according to the assumed community needs.

PEG Support Based on Cable System's Annual Gross Revenues ("GR"):
4% per $ under $5,000,000 GR; plus...
3% per $ between $5,000,000 - $10,000,000 GR; plus...
2% per $ between $10,000,000 - $50,000,000 GR; plus...
1% per $ over $50,000,000 GR

The formula uses a stair-step approach similar to tax tables, so that a 4% PEG funding figure is used for any cable system's first $5M in gross revenues, reducing gradually to 1% for each dollar in gross revenues over $50M.

Building Community Through Media Since 1976

Examples of Annual PEG Funding Amounts, Based on Formula:			
System Size (subs)	**System GR/yr. (Based on $600/sub)**	**Annual PEG Funding**	***Net PEG $/sub/mo.***
5,000	$3,000,000	$120,000	*$2.00*
10,000	$6,000,000	$230,000	*$1.92*
20,000	$12,000,000	$390,000	*$1.63*
30,000	$18,000,000	$510,000	*$1.42*
40,000	$24,000,000	$630,000	*$1.31*
50,000	$30,000,000	$750,000	*$1.25*
60,000	$36,000,000	$870,000	*$1.21*
70,000	$42,000,000	$990,000	*$1.18*
80,000	$48,000,000	$1,110,000	*$1.16*
90,000	$54,000,000	$1,190,000	*$1.10*
100,000	$60,000,000	$1,250,000	*$1.04*
200,000	$120,000,000	$1,850,000	*$0.77*
300,000	$180,000,000	$2,450,000	*$0.68*
400,000	$240,000,000	$3,050,000	*$0.64*
500,000	$300,000,000	$3,650,000	*$0.61*
1,000,000	$600,000,000	$6,650,000	*$0.55*

Channel Capacity

If we compare subscriber base as a representation of community size to PEG capacity, we can develop a sliding scale which provides the minimum number of channels a community generally needs for adequate PEG services. We can keep a fairly consistent amount of capacity per population from system to system, if we acknowledge the efficiencies of channel-time use and production facilities achieved at the top end.

Some current legislative language proposes four PEG channels as reasonable. Assuming that a 750 MHz video system with four analog channels normally would be appropriate capacity for median-sized system, we would be considering 24 MHz or 3.2% of that system. The number of channels offered subscribers on a system does not significantly decrease with the number of subscribers.

Based on general experience, we consider four PEG channels to be typical capacity for a subscriber base of about 35,000.

Scalability of Bandwidth The relative per-sub amount of financial support needed to operate PEG *decreases* as the system size increases. However, the amount of bandwidth necessary to serve community needs *increases* with the number of subscribers:

- A system of 10,000 subs may be served adequately with two or three PEG channels out of 72 analog channels, or about 4%.
- In Manhattan/New York City with 500,000+ subscribers, community needs were barely met with nine analog PEG channels of a 72 channel system at the time of franchise.

PEG Channel Formula (Based on Number of Cable System Subscribers):

Subscribers	Channels	% of Bandwidth
Under 10,000	2	1.6%
10,001-25,000	3	2.4%
25,001-50,000	4	3.2%
50,001-100,000	6	4.8%
100,001-250,000	8	6.2%
250,000 or more	10	8%

This sliding-scale provides a bell-curve in which the vast majority of systems would have four PEG channels. The needs of both smaller and larger communities are met by balanced, market-based tests.

A Word On Percentages Any channel capacity system needs protection from migration of video services to the information services silo. As technology moves forward, there will be market pressure to satisfy PEG requirements with fewer bandwidth resources by not passing along the advantages of innovation. This is often already the case. The number of PEG channels generally remains fixed at old levels even as digital technology provides ten times as many channels in the same space. The digital channels often involve new capabilities for commercial programmers not offered to community programmers.

Fixing PEG at a reasonable percentage of bandwidth based on current channel allotments eliminates this tendency and prevents PEG capacity from being *redefined* out of existence. More importantly, it eliminates regulatory language which might arbitrarily favor one use of technology over another.

- *The use of bandwidth percentages allows a community to align itself with the most current, innovative technology a new system provides while eliminating the need to ever redefine public interest capacity obligations. Within this framework, communities will be able to evolve resources which are comparable in basic function and accessibility to those of other system users for years to come.*

Conclusion We believe that this PEG funding and capacity system would simplify discussions of national franchising by taking two points of negotiation off the table. It speeds the ability of competitors to enter new markets. It protects a valued community resource. Further, it protects the right of our communities to determine the best local use of available resources.

PROPOSED AMENDMENTS REGARDING PUBLIC, EDUCATIONAL AND GOVERNMENTAL ACCESS

SECTION 1. PUBLIC, EDUCATIONAL AND GOVERNMENTAL ACCESS

(a) FUNDING SUPPORT. - In lieu of the public, educational and governmental access facilities and equipment obligations of Sections 611(b) and (c), 621(a)(4)(B), 621(b)(3)(D) and 624(b)(1) and (2)(A), a competitive video service provider shall be subject to the following:

(1) A local franchising authority shall require a competitive video service provider operating in its jurisdiction to pay the local franchising authority or its designee(s), in support of public, educational and governmental access services and facilities, the greater of either (A) a fee of up to the annual amount calculated pursuant to paragraph (a)(2) hereof, or (B) a per-subscriber fee equivalent to the value, on a per-subscriber basis, of any monetary grants, in-kind services, and facilities for public, educational and governmental access channels provided by any cable operator franchised by such local franchising authority pursuant to such cable operator's franchise with the franchising authority or pursuant to any separate agreement with the franchising authority or any other person.

(2) The annual amount that a local franchising authority shall require a competitive video service provide to pay under paragraph (a)(1)(A) hereof shall be calculated by applying the percentage derived under the formula set forth below to the competitive video service provider's gross revenues, as defined in this title:

4% times all gross revenues under $5,000,000 annually, plus

3% times all gross revenues between $5,000,000 and $10,000,000 annually, plus

2% times all gross revenues between $10,000,000 and $50,000,000 annually, plus

1% times all gross revenues over $50,000,000 annually.

(3) If the monetary grant and/or in-kind service and facilities obligations of a cable operator franchised by a local franchising authority within the jurisdiction where a competitive video service provider is providing service are subsequently changed as a result of cable franchise renewal pursuant to Section 626 or otherwise, and prior to such franchise renewal, the local franchising authority was imposing on the competitive video service provider the per-subscriber equivalent fee set forth in paragraph (a)(1)(B) hereof, then after such franchise renewal, the per-subscriber equivalent fee paid by the competitive video service provider shall be adjusted to be comparable, on a per-subscriber

(C) four channels (3.2 percent of bandwidth) for any franchise area with 25,001 to 50,000 subscribers;

(D) six channels (4.8 percent of bandwidth) for any franchise area with 50,001 to 100,000 subscribers;

(E) eight channels (6.2 percent of bandwidth) for any franchise area with 100,001 to 250,000 subscribers; and

(F) ten channels (8 percent of bandwidth) for any franchise area with more than 250,000 subscribers.

SECTION 2. CONFORMING AMENDMENTS.

(a) CABLE SERVICE. Section 602(6) of the Federal Communication Act (47 U.S.C. § 522(6)) is amended by:

(1) inserting after "video programming **service,"** at the end of Section 602(A)(i) the following: "including interactive on-demand services,"; and

(2) inserting after "other programming service" at the end of Section 602(6)(B) the following: ", regardless of the technology or transmission protocol used to transmit, select, or interact with such video programming or other programming service."

(b) FRANCHISE FEE. Section 622(g)(2) of the Federal Communications Act (47 U.S.C. § 542(g)(2)) is amended by:

(1) striking "in the case of any franchise in effect on the date of enactment of this title," from subparagraph (B);

(2) striking subparagraph (C); and

(3) re-numbering subparagraphs (D) and (E) as subparagraphs (C) and (D).

MR. WALDEN. [Presiding] Mr. Riddle, thank you for your testimony. Ms. Kenney, welcome and we look forward to your comments.

MS. KENNEY. Thank you. We very much appreciate the opportunity to testify today, and I am testifying on behalf of the Consumer

Federation of America, Consumers Union, and Free Press. We are glad to be here particularly since, as Ms. Johnson noted, this battle really has been presented to you as a pitched battle among industries. And while they have a lot of stake in this fight, and it is a good sport to some to fight over who cares about consumers more. At the end of the day, consumers will be the ultimate winners or losers of this. And what you do here matters very much in that outcome. We are very grateful for your interests in promoting new video competition to provide consumers with some great relief from skyrocketing cable prices that have increased anywhere from 64 percent or more, depending on which number you pick over the last ten years.

Regardless of the number, we know that number is high, and we know the increases are the result of the market power of the cable monopolies who force consumers to pay more each year for bigger bundles of channels that many of them never watch. So we know we need new competition in cable, and we are eager for it. We look to the video franchising debate, and the interest of the Bells in providing video services as an opportunity for at least a second wire line competitor in cable.

And as Ms. Blackburn noted, this is also about broadband. This is about bringing broadband access to people who don't have it right now. And while two providers are better than one, more are needed. And without strong network neutrality policies, the opportunity for video competition offered over the Internet will be lost. That concern is made even greater by FCC's DSL and cable modem order.

So having said that, we believe this is the time for the committee to be looking at the video franchising process, and to balance the consumer needs and community interest against the need for new entrants, and create strong enforceable network neutrality policies.

Having said that, we believe that the Act before the committee fails on both counts. We also believe those problems can be solved. We are grateful for the inclusion of provisions that protect the right of communities to offer their own broadband services. But we fear that under this bill Americans who are already frustrated with their cable TV prices, basic service, and limited choices will get more of the same or worse. Rather than promote competition in a manner that will benefit all consumers, it rolls back protections they currently have without any assurances that they will get new competition.

Let me briefly highlight our concerns. Obviously we are concerned that there is no build-out requirement for telephone companies that will allow them to effectively redline, picking the wealthiest neighborhoods and leaving middle and low-income families behind. It releases the cable companies from their obligations to build-out, to upgrade, and to provide

for a uniform restructure when the Bell company serves just one consumer. Consumers who don't get that service, don't get a competitive service from the Bell company, get hit many times. They don't have a competitive choice. They may face higher prices because cable is no longer obligated to provide for a uniform rate structure, and they may have reduced service quality.

The bottom line is that cable should not be released from its uniform rate obligations, from its build-out and upgrade obligations, unless the Bell competitors are required to build-out to the entire franchise area over a reasonable period of time.

Let me talk to you just for a moment about network neutrality. This issue in particular has been presented as a battle between big Internet companies and big telecommunications and cable companies. In reality, this is the one provision of the bill that could most hurt consumers if it is not addressed. Currently, the bill strips the FCC of its authority to do more to protect consumers from network discrimination. History shows us that telecommunications and media giants will use their network power to discriminate. You don't need to look much further than the media clips from the last few weeks to see that that's happening. Cable is complaining about interconnection, Verizon is complaining about lack of access to program carriage, and telephone companies are complaining about their inability to get ads carried on cable television networks. They are different networks, but it is the same incentive to block access to competitors. The impact on consumers will be enormous. Innovation will be stifled without solid network neutrality policies. If the telecommunications and cable companies provide for access tiers, consumers will pay twice, because whatever the Internet companies charge will be passed on to them eventually, and there is an opportunity for competitive services offered over the Internet.

Let me speak briefly about bundling. This was a concern that Mr. Bass noted earlier today and Mr. Keefe alluded to. One of our significant concerns associated with video competition is access to programming on a fair and competitive basis. If the Bell entrants do not have the ability to negotiate fairly for program carriage, consumers will be left behind in terms of opportunities for more competitive bundles, more competitive prices, and more specialty tiers and so forth. Until we address anti-competitive bundling and tying arrangements that the dominant program providers require currently of distributors, you are going to have a difficult time. It will be very difficult for the new video distributors to offer carriage in a manner that is competitive.

We do not think these concerns are insurmountable. We think they can be rectified with reasonable build-out requirements for new entrants or in lieu thereof. Resources for the community to provide better

broadband access for underserved communities with higher competitive thresholds before cable is released from its own build-out obligations and uniform rate requirements, meaningful and enforceable network neutrality provisions, and strong consumer protections that are enforceable at the State and local level.

Thank you.

[The prepared statement of Jeannine Kenney follows:]

PREPARED STATEMENT OF JEANNINE KENNEY, SENIOR POLICY ANALYST, CONSUMERS UNION

Summary

Consumers Union,[1] Consumer Federation of America,[2] and Free Press[3] appreciate the opportunity to testify on the issue of national video franchising and competition in video services. We welcome the Subcommittee's interest in fostering greater consumer choice by promoting competition in the concentrated cable marketplace.

Consumers have suffered under monopolistic cable pricing that has resulted in a 64 percent increase in rates—approximately two and a half times the rate of inflation—since Congress deregulated the cable industry in the 1996 Telecommunications Act. In addition to skyrocketing rates, consumers have virtually no choice of providers or channel offerings. Satellite television, the primary competitor to cable, has had little price disciplining effect. In the few areas where actual facilities-based competition exists, consumers enjoy cable prices that are 15 percent lower than non-competitive markets.[4] A national franchise system with strong consumer protections and appropriate provisions to meet local needs could foster new video competition and discipline ever-rising cable rates.

Unfortunately, the Communications Opportunity, Promotion and Enhancement Act not only fails to ensure the national franchising system it creates will benefit consumers, it almost surely represents a significant step backward. While the legislation laudably protects community rights to establish broadband networks, it eliminates other protections that ensure all residents have access to competitive, advanced communications services. The legislation abolishes communities' authority to ensure all residents are served by new and existing cable providers without establishing any federal build-out requirements in its place, opening a wide door to redlining. It rolls back state and local authority to establish and enforce consumer protections without requiring new, strong federal protections. And it strips the Federal Communications Commission of its

[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to Provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Report*s, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with more than 5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] The Consumer Federation of America is the nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power an cooperative organizations, with more than 50 million individual members.

[3] Free Press is a national nonpartisan organization with over 200,000 members working to increase informed public participation in crucial media policy debates.

[4] GAO-04-8**,** p. 11.

authority to establish rules ensuring that broadband network owners do not impair or block consumer access to competitive Internet content, services or applications. Moreover, enforcement provisions within the legislation are weak or absent. In short, the legislation not only fails to ensure that consumers will benefit from new video competition, it may expose them to the risk of higher cable rates, reduced quality and reduced access to competitive choices offered via the Internet.

Consumers Who Most Need Competition Will Be The Least Likely To Receive It

Because the legislation does not require new cable providers operating under a national franchise to serve all consumers within a franchise area, new entrants will be free to offer service to only wealthy neighborhoods, leaving behind middle and low-income consumers who most need cable rate relief. It also eliminates the existing authority of communities to require that cable providers serve all residents—something virtually every franchising authority has done. To ensure that the benefits of competition come to those who need it most, the legislation should require telephone companies entering the video market to build out their services to all consumers within a franchise area over a reasonable period of time, with appropriate accommodations for very low-density areas. This is not only critical to ensure video competition will discipline cable rates, it is also central to reversing the alarming trends in the broadband market. Next generation cable services bring broadband as well. Absent a build-out requirement, underserved areas will be permanently stranded on the wrong side of the digital divide.

Skepticism that telephone companies will offer their video services to all residents rather than just the wealthiest is particularly warranted given SBC's statements last year that it would roll out Project Lightspeed, the company's IPTV video offering, to 90 percent of its high-value customers. It defined "high-value" customers as those willing to spend up to $200 on communications services per month. They make up just 25 percent of SBC's subscriber base. SBC also contended it would provide the video service to just 5 percent of low-value customers that constitute 35 percent of its customer base.[5] Assurances that "low-value customers" would still be able to receive satellite video through SBC's affiliation with Dish Network ring hollow, given the failure of satellite to provide meaningful price discipline. Instead, SBC's statements suggest it will offer services only in largely affluent areas, disregarding communities made up predominantly of low- or middle-income consumers.

Similarly, Verizon's conduct to date strongly suggests it is seeking franchise agreements for its FiOS service in only the wealthiest counties in the country. For example, Verizon has negotiated or signed franchise agreements with largely affluent local franchise areas—such as in Fairfax County, Va. (where it has four franchise agreements in place for Herndon, Fairfax County, Fairfax City and Falls Church); Howard County, Md.; Massepequa Park in Nassau County, N.Y.; Nyack and South Nyack, in Rockland County, N.Y.; and Woburn in Middlesex County, Mass. In terms of median family income, Fairfax County ranks No.1 nationally; Howard ranks fourth; Nassau 10th; Rockland 12th and Middlesex 17th.[6] New Jersey, in which Verizon is seeking a statewide franchise but resisting state-wide build-out requirements, is home to 12 of the top 100 richest counties in the nation.

Verizon has agreed to universal or nearly universal build-out requirements in several of its franchise agreements. Given the wealth of those areas and the current authority of those franchise authorities to require build-out, Verizon's agreement reveals little about whether the company will voluntarily build-out to all parts of mixed-income franchise areas, assuming it even enters them. What those commitments do show is both that build-

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[5] USA Today. **"Cable, phone companies duke it out for customers," June 22, 2005.**

[6] U.S. Census Bureau. Median Family Income; Counties within the U.S., 2004 American Community Survey.

out has been important to those localities and that it need not be a barrier to the company's entry. On the contrary, Verizon has quickly negotiated agreements that offer substantial community services and consumer protections.

SBC's lightly veiled admission of its plans for economic redlining and Verizon's video franchising practices suggest new entrants will enter only largely affluent, densely populated franchise areas and that if they enter mixed-income franchise areas (those with both high and low income populations), they'll provide service only to portions of those markets unless required to serve all residents.

To effectively enhance competition and ensure that its benefits come to all consumers, any national franchising legislation must require new entrants to build-out their services to all consumers over a reasonable period of time. Particularly in areas where telephone companies already have facilities, build-out should be timely and mandatory.

In the absence of national build-out requirements, Congress should establish financial incentives for new entrants to serve the entire community. Telephone companies that do not agree to serve the entire community should be required to provide sufficient financial resources to local communities, in addition to reasonable rights-of-way fees paid, for use in fostering alternative means of ensuring broadband competition. Those resources could be used to establish community broadband networks, competitive commercial services to areas unserved by the new entrant, or other means of assistance to help low-income consumers access advanced telecommunications services at affordable prices and meet local community communications needs.

Consumers May Be Denied Service Upgrades By Incumbent Cable Providers

The legislation allows incumbent cable providers to jettison the build-out and upgrade requirements to which they are bound under local franchise agreements whenever a new market entrant offers service to just one household in the franchise area. If a telephone company offers its video service in only part of the franchise area, as they are allowed to do under the legislation, an incumbent cable provider will have both the ability and the financial incentive to offer service upgrades to competitive areas while denying them to customers in neighborhoods not served by the new entrant. Even the National Cable and Telecommunications Association has pointed out the importance of providing network upgrades in an equitable and non-discriminatory manner.[7] Unfortunately, under the legislation, incumbent cable providers will be under no obligation to do so, and the communities they serve will be stripped of their ability to require non-discriminatory upgrades. Even more troubling, a cable incumbent operating under a national franchise would be equally free to withdraw service entirely from neighborhoods it currently serves.

Consumers May See Their Cable Rates Rise, Not Fall

The legislation also fails to protect consumers from discriminatory pricing that may result when local exchange carriers begin offering video service in a franchise area. Under current law, cable providers need no longer comply with the statutory requirement that they charge uniform rates across the franchise area once a common carrier offers video service to just a single household in that area. The legislation does nothing to change that. Therefore, under the legislation, an incumbent cable provider could lower rates in areas served by new competitors and raise them elsewhere to offset discounts. And regardless of how limited the competition, cable is given free-reign to price discriminate. Consumers who are not served by the new Bell competitor would be hit

[7] National Cable & Telecommunications Association, 2006, "The Bell Monopolies Want a Special Break to Enter the Video Business." Http://www.ncta.com/pdf_files/Bell_Myths_FINAL_03.06.06.pdf

twice—they will lack a competitive alternative to the incumbent and they may face higher cable rates and declining service quality. If Congress does not require that new entrants build out to the entire franchise area, it must, at a minimum, require that cable incumbents maintain a uniform rate structure until uptake of competitive telecommunication video services reaches a significant threshold.

Anti-Redlining Provisions Are Insufficient To Ensure Low- And Middle Income Consumers Are Not Left Behind

The legislation appropriately prohibits redlining based on income. Unfortunately, in the absence of build out requirements, the anti-redlining provision, on its own, will be not be sufficient to ensure low-income areas will be served by new video providers. Existing Title VI anti-redlining provisions have only been effective because they exist *in tandem* with the ability of local franchise authorities to require service throughout the franchise area over time. Without requirements for build-out, anti-redlining provisions are toothless.

Moreover, redlining, particularly as defined in this bill, will be difficult to prove and violations will be difficult to enforce. So long as the burden lies with authorities to prove that income is the sole reason a cable company has denied service or upgrades, the anti-redlining provision will be largely symbolic. Providers may justify failure to provide service to particular neighborhoods based on insufficient demand or economic infeasibility. Therefore, any anti-redlining prohibition should place the burden of proof on cable providers, not local, state or federal authorities. That is, the providers should be required to prove that service denial is justified for reasons other than income.

The legislation should also provide for concurrent anti-redlining enforcement by states and localities and include strong penalties for violations. Localities, in particular, have specific knowledge of local economic circumstances; a providers' service history in the community; and other knowledge that allows them to identify redlining concerns. They are also more accountable and responsive to their citizens than federal regulators and are more likely to take timely action to resolve redlining concerns.

In addition, to improve the effectiveness of anti-redlining enforcement, the legislation should require the FCC to collect data that will allow enforcement authorities to identify redlining violations. Currently, FCC lacks data that would help identify patterns of service and potential redlining in broadband—the technology over which telephone companies will deliver video services. Additional reporting requirements and analysis should be part of the systematic process of oversight. Cable service providers should be required to submit regular reports about the location, density, and level of service offered in each franchise area. Finally, the bill should provide for cross-tabulation of census data with the cable service provider reports to identify.

Consumer Protections Are Weakened

Under current law, states and localities have authority to establish more stringent cable customer service standards than required by federal law. Localities are able to enforce those standards through the terms of and renewal process for their local franchising agreements. Many franchise authorities have staff and offices dedicated to resolution of cable complaints that provide for speedy resolution of customer billing concerns, service outages and more. Penalties in the form of liquidated damages or mandatory discounts for customers harmed by a provider's violation of customer service standards are not uncommon.

The Communications Opportunity, Promotion and Enhancement Act strips states and localities of their authority to both establish and enforce consumer protections that exceed the federal minimum standards and gives enforcement authority solely to FCC, significantly weakening consumer protections. States and localities will have only the ability to issue compliance orders when providers violate Commission standards. They

can take no enforcement action of their own unless FCC regulations so prescribe, raising serious concerns about the timeliness and resolution of complaints. Communities, now empowered to resolve customer disputes with their cable provider, would be left with only the ability to issue compliance orders that FCC alone may enforce.

Any national franchise legislation should retain state and local authority to establish customer service standards and consumer protections. Consumers must have a means for timely and local resolution of complaints against their service providers. Federalizing consumer protection is neither workable nor acceptable. The Federal Communications Commission is ill-equipped to address billing, services and outages complaints in a timely manner. Customer service, the process for resolving complaints, reporting requirements and accountability of providers to officials must remain local, with appropriate and meaningful sanctions for violations. At a minimum, the legislation should provide for strong federal minimum consumer protection requirements that reflect the more stringent criteria established to date by states and localities and provide states and localities with concurrent enforcement authority.

Finally, the legislation inexplicably and immediately eliminates the existing federal requirement that cable companies provide consumers with 30-day advance written notice before changing channel assignments. This uniform and common sense provision helps reduce consumer confusion and improves the accountability of cable providers. Even on the theory that competition under a national franchise may help discipline anti-consumer practices, under the legislation as drafted, many consumers in a given market will be without that competitive alternative. In fact, even if a telephone company offers service to just one household or one neighborhood, the dominant incumbent cable provider in that franchise area could seek a national franchise and be released from the written notice provision. Congress should maintain this commonsense consumer protection.

Broadband Discrimination Protections Are Inadequate

It is critical that any video franchising legislation include strong, enforceable network neutrality policies required to protect consumers and preserve the Internet as a source of innovation and competition. However, as drafted, the network neutrality provisions in Section 201 of the Communications Opportunity, Promotion, and Enhancement Act are inadequate to protect consumers from network-owner discrimination against competitive, Internet-based content, applications, and services. Relying on the FCC's policy statement on network nondiscrimination is insufficient. There is no mention in that statement of protection against the practice many network operators have announced they will undertake—dividing the Internet into pay-for-play tiers of service, or "access tiering." Unfortunately, the legislation not only fails to provide for stronger protections than encompassed in FCC's policy, it simultaneously strips the FCC of its rulemaking authority to protect consumers from discriminatory network practices and provides for only case-by-case enforcement of FCC's already weak network neutrality policy.

Services, content and applications delivered via broadband offer consumers new opportunities for competitive telecommunications and video services. But the telephone and cable companies that dominate the broadband market have strong incentives to shut out those competitors through access tiering, by impairing transmission, or by prohibiting use of devices or applications on their networks. To protect consumers, Congress should pass clear legislation and require the FCC to issue strict and enforceable regulations prohibiting discriminatory practices. The enforcement process must be timely and require the network operator to bear the burden of proof. We must ensure that no entrepreneur is posthumously vindicated by the FCC after a complaint process drags on for months. In short, the FCC's authority must be expansive and its direction clear.

As subscription video services are increasingly offered using Internet-based technologies, maintaining the Internet as a neutral platform on which network owners

cannot discriminate becomes even more essential. The Bells are not the only providers who could compete with cable. Increasingly, "video on demand" is being offered over the Internet, where consumers can access movies or pay to watch a single episode of a single program. As Congress considers ways to increase competition in video services, it must not overlook independent Internet content providers as a third competitor. But that source of competition will be squelched without strong, enforceable prohibitions on network discrimination. Both cable and telephone companies can use their network control to prioritize their own video content over others.

Moreover, a network neutrality policy that permits "access tiering" virtually guarantees higher consumer prices. Recent media reports describe operators' plans to create "access tiers" of service that will charge Internet companies fees to bring their products and services to subscribers. The fees charged to content and service providers will inevitably be passed onto consumers who have already paid for high-speed access. Though this may be rational market behavior for short-term return on investment, it is patently discriminatory and reflects a fundamental change in the nature of the Internet. Only those companies who can afford to pay for access will be able to reach consumers, stifling innovation, impeding competition and hiking end user costs. Hidden costs and discriminatory prices are anathema to consumer interests.

Ironically, both cable and telephone companies who now object to strong network neutrality legislation have a lengthy record of using their market control to preclude competition. And in recent weeks, these same players have complained about the discriminatory practices of their own competitors. AT&T has complained that Time Warner has refused to run telephone industry advertisements supporting national franchising on its cable network. Time Warner has filed complaints against incumbent telephone companies over refusals to provide interconnection for its VOIP services. And Verizon has complained that Rainbow Media, and its parent company Cablevision, are denying Verizon carriage of its regional sports cable networks. The complaint explicitly sites the discriminatory practices of a cable operator using market power to eliminate competition.

In each of these cases, the discriminating party is using its control over the network to preclude a competitor. There is every reason to believe the both dominant cable and telephone providers will likewise use their control over broadband networks to discriminate against Internet-based companies that offer services that compete with their own.

With a strong network discrimination prohibition, the promise for competition in video will come not just from Verizon and AT&T, but from any other entrepreneurial company that offers video via the Internet in a manner more appealing to consumers. Without such a prohibition, however, that promise of competition and innovation will be lost.

More Protections are Required to Ensure Community Needs Are Met

While the legislation includes requirements that any provider operating under a national franchise meet basic obligations to serve the community, we are concerned that the legislation falls short in a number of areas.

- **Institutional Networks:** The legislation maintains existing obligations of incumbent cable companies to provide institutional networks (I-Nets) for schools, libraries and government buildings under their local franchise agreement, but makes no provision for communities who may not yet have an I-Net but have existing authority to negotiate for one. I-Nets have played an important role in providing communities with advanced communications services and have been critical in helping to bridge the digital divide. If localities are to be stripped of their ability to negotiate for these networks, any national franchise should also

provide for national uniform requirements for I-Nets in communities that lack them.

- **Local, Independent and Diverse Programming**: The legislation laudably requires new entrants to carry any public, education and government (PEG) access channels already carried by incumbents under incumbent franchise agreements and provides for incremental improvements in capacity over time. But, as with I-Nets, it fails to establish a national minimum requirement for carriage of local, independent channels, leaving those communities who lack carriage of such channels currently, but retain authority to negotiate for them, with no recourse. The legislation could remedy this by establishing a national minimum carriage requirements in all franchise areas.

Moreover, while establishing national requirements for financial support of institutional networks and public access channels, carriage of PEG channels, and local franchise fees, the bill provides for no explicit enforcement of those requirements. The only penalty for noncompliance appears to be franchise revocation—a heavy hammer FCC will be reluctant to bring down. Currently, localities enforce those provisions through their franchise agreements. Communities can prevent violation of franchise agreements before they occur by including penalties within their agreements. National franchise legislation must provide for explicit enforcement of franchise conditions in a manner that empowers communities and states to ensure the needs of communities are being met by video providers.

To Foster Video Competition, The Legislation Should Include Prohibitions On Programmer Tying Arrangements

In order for true price competition to emerge in multichannel video markets, Congress must also address anticompetitive tying requirements imposed by dominant media companies.

At the same time that the cable distribution market has consolidated, concentration in video programming has increased dramatically. Broadcast giants and cable programmers have merged; broadcast and satellite distributors have merged; and cable distributors increasingly offer their own programming or have gained ownership stake in other video programmers. The anticompetitive effects of concentration in video programming decreases the likelihood that new Bell video market entrants will be able to effectively compete on price and on channel offerings.

Program carriage contracts typically stipulate that distributors offer several or all of the programmer's channels in the most widely viewed tier (usually the expanded basic tier), regardless of consumer demand for them, and prohibit channels from being offered to consumers individually or in specialty tiers. These bundling requirements have contributed to increased size and price of the expanded basic tier, which has increased in cost by two and a half times compared to the basic tier.[8]

Media companies can secure these commitments because of their market power. Six media giants, including the top four broadcasters, dominate the programming landscape, accounting for three-fourths of the channels that dominate prime time.[9] Four are networks (ABC, CBS, FOX and NBC) and two are cable operators (Time Warner and Comcast). The networks use the retransmission consent negotiations for carriage of the local stations they own and operate to leverage local cable carriage of their other channels. These six companies also completely dominate the expanded basic tiers and the realm of networks that have achieved substantial cable carriage. These six entities account for almost 80

[8] Mark Cooper, *Time to Give Consumers Real Cable Choices,* Consumer Federation of America & Consumers Union, July 2004, p. 5.

[9] MM Docket No. 92-264, Comments of CFA, CU, Free Press in the Matter of The Commission's Cable Horizontal and Vertical Ownership Limits and Attributions Rules., August 8, 2005.

percent of the more than 90 cable networks with carriage above the 20 million subscriber mark.

Moreover, cable operators are majority owners of one-fifth of the top 90 national networks—a substantial stake in the programming market.[10] They also own minority stakes in other networks, as well. The Government Accountability Office found that vertically integrated distributors or those affiliated with media companies are more likely to carry their own programming, [11] contributing to the size and cost of the expanded basic tier. These vertically integrated networks continue to have the largest number of subscribers,[12] and are the most popular.[13] Program ownership by dominant incumbent cable distributors also provides the incentive to withhold carriage of cable networks they own from competitive video distributors. This is the basis of Verizon's recent complaint against Rainbow Media and Cablevision over sports channel carriage.

Independent, unaffiliated cable distributors that do not own their own programming have consistently expressed concerns about exclusionary tactics, contractual bundling requirements, and coercive retransmission consent negotiations that limit their ability to respond to customer demand for more choice in program packages and for lower prices.[14]

It is therefore essential that Congress include in any national franchise legislation provision that address anticompetitive and coercive contractual requirements, including retransmission consent abuse. Failure to do so will impede the ability of any new video market entrant, including Verizon and AT&T, to compete on price. They'll be forced to buy the same channels their competitor is carrying; pay the same or greater licensing fees; and offer the same packages. Worse, they will be precluded from offering consumers channels individually or in specialty tiers, rather than in a large and costly bundle, even though doing so may give them an opportunity to differentiate their services from the incumbent cable monopoly and respond to strong consumer demand for greater channel choice.

The Right of Municipalities to Provide Broadband Networks is Protected

We offer our strong and unqualified support for Section 401 of the legislation, which prohibits state preemption of municipal broadband networks—a critical component of any legislative package that seeks to increase consumer access to advanced telecommunications services and foster competition in data, video and voice services, and expand affordable high-speed Internet access to all Americans.

Hundreds of communities have responded to the lack of affordable broadband access by creating their own networks through public-private partnerships, offering new opportunities for entrepreneurs. Community broadband networks offer an important option for communities in which broadband services reach only certain areas or are offered at prices out of reach for many consumers. Equally important, the mere possibility that a community may develop a broadband network helps discipline the marketplace.

Efforts to prohibit these community networks stifle competition across a range of telecommunications services, stall local economic development efforts, and foreclose

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[10] GAO-04-8, p. 27.
[11] Id. at 29.
[12] Federal Communications Commission, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming: Eleventh Annual Report, January 14, 2005, ¶150.
[13] Id. at ¶151.
[14] EchoStar Communications Corporation, Testimony of Charles Ergen, Chairman & CEO, EchoStar Communications Corporation before the Senate Committee on Commerce, Science and Transportation, January 19, 2006; Testimony of Bennett Hooks, Chief Executive Officer, Buford Media Group on behalf of the American Cable Association, before the Subcommittee on Telecommunications and the Internet, July 14, 2004.

new educational opportunities. Section 401 ensures that communities that want to foster broadband access are not precluded from doing so.

Conclusion

The need for greater competition in the monopolistic video marketplace is an urgent one—but it has been urgent for a decade. We urge Congress to take the time to consider the many policy issues that must be addressed before abandoning the fundamental consumer protections encompassed in current law. These include mandatory build out requirements or in lieu thereof resources to meet the needs of underserved consumers; provisions that prevent cable providers from backsliding on their current obligations to serve the entire community; strong consumer protections with state and local enforcement authority; prohibitions on anticompetitive contractual channel bundling requirements that reduce consumer choice and prevent product differentiation; and a strong enforceable prohibitions on broadband network discrimination.

We thank the Subcommittee for the opportunity to testify and look forward to working with you on legislation that promotes competition in the video marketplace that benefits all Americans.

MR. UPTON. Mr. May?

MR. MAY. Mr. Chairman and members of the committee, thank you very much for inviting me here to testify today. I am Senior Fellow and Director of Communications Policy Studies at the Progress and Freedom Foundation, a non-profit, non-partisan research and educational foundation located here in Washington.

During the past year, I have chaired PFF's Digital Age Communications Act Project, the purpose of which has been to draft a new model communications law. While my views have been informed by the work of the participants in the DACA project and my PFF colleagues, the positions I express here today are my own.

When Congress passed the 1996 Act and I was glad Ms. Johnson actually referred back to it, it stated that it intended "to provide for a pro-competitive deregulatory national policy framework." While the 1996 Act in my view should have been much more unambiguously deregulatory and should have gone further in creating a national policy framework at that time due in part to the changes of law and policy brought about by the Act and to an even greater measure to the rapid fire technological changes enabled by the digital revolution.

We now enjoy a communications marketplace characterized by competition and convergence. I do not have time today to belabor this point by citing the readings of statistics or the very latest news stories about new competitive entrance or new services or new applications. It should be sufficient to point out that we live in a world in which firms that we still sometimes call cable television companies provide voice services to their subscribers at every increasing rates. Companies we still call telephone companies are racing to provide video services and competition with cable and satellite television providers. New market

entrants like Vonage, which calls itself the broadband telephone company, utilize super efficient internet connection to carry voice traffic. Wireless providers we still call cell phone companies integrate voice, video, and data for delivery any time anywhere to a small screen, which you carry in your pocket. They now even distribute television programming. And popular websites such as those operated by Yahoo, Google, Microsoft, and thousands and thousands more that are not as dominant as those companies, but which have their own intensely loyal viewers, compete with the traditional cable companies and broadcasters, not to mention newspapers and magazines for consumer's eyeballs. While we may quibble around the edges about degree, competition and convergence of services are realities in today's communications marketplace.

Now in my written testimony, I have outlined a broader program of more comprehensive communications reform. But with the time that I have available for the initial statement, I want to focus on the broadband section of the bill because in the form proposed, it has the real potential to cause substantial harm to the broadband marketplace. This section of course provides that the FCC has the authority to enforce the four broadband connectivity principles the agency adopted in August 2005. In essence, the FCC principles embody the bundle of access rights that are commonly referred to as net neutrality mandates. Congress should not enact into law any specific neutrality provision mandating access rights and non-discrimination obligations. Assuming for the sake of argument that Congress nevertheless is intent on doing so, any net neutrality-specific provision should be revised in the manner that I will suggest.

The increasing competitiveness in the existing contestability of the broadband marketplace makes it very unlikely that broadband operators will take any actions of the type intended to be prohibited by the net neutrality prohibitions. If they did and as we already heard this morning, thus far, essentially they have not. Broadband operators which, excuse me, consumers would switch providers. Broadband operations are in the distribution business. Consumers do not demand bare broadband by itself. They want the content that broadband distribution provides. If broadband operators are going to invest billions of dollars building out new broadband networks, operators will not find it in their interest to block, or impair, or degrade subscribers from accessing services and content that the consumers find valuable.

It is also true that when broadband operators contemplate investing billions of dollars in new high speed networks, the ability to bundle distribution with content and to enter into efficient business arrangements with unaffiliated content and application providers may be

crucial to providing the incentive to invest. And the ability of an operator to differentiate its service from that of another operator may be critical to the decision to invest in new networks and service applications.

Competitive markets often involve legitimate price and service discrimination and network owners often are pursuing legitimate technological or business objectives in particular cases when they differentiate their services. Take one example, I think which illustrates this point vividly. Clearwire is a new wireless entrant into the marketplace. Clearwire gave Bell Canada exclusive rights to distribute VOIP over Clearwire's new wireless broadband network in exchange for $100 million investment by Bell Canada. Would consumers be better off if this discrimination were prohibited as it would be under any neutrality provision and Clearwire's new network not be built? I do not think so.

So I do not think Congress should enact a neutrality-specific provision. But if Congress is going to do so, it is very important that it not enact a broad overly inclusive mandate. To prevent this, the committee should incorporate into the provision an unfair competition standard that should explicitly tie the FCC's authority to enforce the broadband principles to this unfair competition standard. While the preference in the bill for adjudicatory proceedings is positive, alone it is not sufficient that the new law will not be interpreted by the agency or by the courts on reviewing the agency's decision in a way that is essentially equivalent to traditional common carrier principles.

The hallmark of common carriage is the obligation not to discriminate and charge reasonable rates. Without the competition, without tying these principles to a competition base provision that looks at particular markets, the market structure and market power, it is very likely that these principles will be interpreted in a way that equates precisely with traditional notions of common carriage.

When Chairman Barton asked all of the participants this morning on the first panel this afternoon to define net neutrality, we heard a bunch of different definitions. But Mr. Misener from Amazon, who is a proponent of net neutrality, actually came close, I think, to having it right. He said basically that net neutrality is market power extended into other markets. But the way to deal with it is to ensure that if there is going to be any determinations made, that they are dealt with in adjudications, as you provided, and specific circumstances looking at particular facts so the situations like the Clearwire example probably would not constitute a violation of net neutrality.

MR. UPTON. If you could sum up, you have gone four minutes longer than the five.

MR. MAY. Okay. I am outnumbered here about four to one but I will do that, thank you, Mr. Chairman.

The way I would sum up is just this, that I think that what is important for the committee to focus on as it goes forward is to import into this bill notions of regulations that are tied very specifically to competition assessments and standards.

Thank you.

[The prepared statement of Randolph J. May follows:]

PREPARED STATEMENT OF RANDOLPH J. MAY, SENIOR FELLOW AND DIRECTOR, COMMUNICATIONS POLICY STUDIES, THE PROGRESS & FREEDOM FOUNDATION

SUMMARY

The Committee should be commended for the substantial progress it has made since the earlier two staff drafts in proposing a bill that will represent sound communications policy. Especially with regard to the national cable franchise proposal, in many respects the proposal furthers the worthy intent stated by Congress when it passed the Telecommunications Act to adopt a "pro-competitive, deregulatory national policy framework."

As for the Broadband Policy section, it would be far preferable for Congress not to include a net neutrality-specific provision in the bill. There certainly have not been more than a few scattered instances of alleged marketplace abuses. Moreover, in the increasingly competitive broadband marketplace, there is no reason to anticipate that broadband operators will not be responsive to making available services that consumers value. Assuming for the sake of argument that Congress is intent on including a net-neutrality-specific provision, however, it should explicitly tie enforcement of the FCC's broadband principles to determinations made under a market-oriented unfair competition standard such as the one I suggest in my testimony. Absent clearly tying FCC authority to a competition-based standard that will require the agency to undertake a rigorous fact-based economic analysis of the particular marketplace circumstances that exist at the time, there is a great danger that enforcement of the access mandates at the core of the broadband principles will turn into a general common carrier regime for broadband operators. Extending the non-discrimination obligations and rate regulation requirements that are hallmarks of a common carrier regime, and which may have been appropriate in a monopolistic narrowband era, to the competitive broadband era will certainly stifle new investment and innovation and impose an overall drag on the nation's economy.

In light of the competition that already exists in the video marketplace, and the potential for even more competition from telephone companies and other new entrants, there is no longer any rationale for local franchising authorities to play a public utility-type economic regulatory role. This is true for new entrants such as the telephone companies and for incumbent cable operators alike. The proposal for a national franchise will speed the development of further video competition and, indeed, the deployment of new broadband networks. At the same time, the Committee should consider further improvements in the video section of the bill suggested in my testimony, such as eliminating the PEG and institutional network mandates.

Mr. Chairman and Members of the Committee, thank you very much for inviting me to testify today. I am Senior Fellow and Director of Communications Policy Studies at The Progress and Freedom Foundation, a non-profit, nonpartisan research and educational foundation located in Washington, DC. PFF is a market-oriented think tank that studies digital revolution and its implications for public policy. During the past year,

I have also co-chaired our Digital Age Communications Age ("DACA") project. The purpose of this project has been to draft a new model communications law. In order to carry out this purpose, PFF assembled into working groups a diverse group of leading academics and think tank scholars—lawyers, economists, and engineers—who are experts in the field of communications policy. The views I express here today have been informed by the work of the participants in the DACA project. But I want to emphasize at the outset that while my colleagues at PFF, and other participants in the DACA project, may share many of my views, the positions I express here today are my own.

I. Introduction

It has been ten years since enactment of the Telecommunications Act of 1996. Recall that when Congress passed the 1996 Act, it stated that it intended "to provide a for a **pro-competitive, deregulatory national policy framework** designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." While I believe that the 1996 Act could have been much more unambiguously deregulatory, the fact of the matter is that, due in part to the changes in law and policy brought about by the act, and due in even greater measure to rapid-fire and ongoing technological changes enabled by the digital revolution, we now enjoy a communications marketplace characterized by competition and convergence. I am not going to belabor this point here by citing reams of statistics or the very latest (usually this morning's!) news story about a new competitive entrant or a new communications service or application. For my purpose today, it is sufficient to point out that we live in a world in which firms we still sometimes call "cable television" companies provide voice services to their subscribers at ever increasing rates. Companies we still call "telephone companies" or "telecommunications providers" are racing to provide video services in competition with cable and satellite television providers. New market entrants like Vonage, which calls itself "the broadband telephone company," utilize super-efficient Internet connections to carry voice traffic. Wireless providers we still sometimes call cellphone companies integrate voice, video and data for delivery anytime, anywhere to a screen you carry in your pocket. They now distribute popular "television" programming. And popular web sites, such as those operated by Yahoo, Google, Microsoft, and thousands and thousands more that are not as dominant but which have their own intensely loyal "viewers", compete with traditional broadcasters and cablecasters, not to mention newspapers and magazines, for consumers' eyeballs.

So while we may quibble around the edges about degree, competition and convergence of services are realities in today's communications marketplace. That being the case, any communications law reforms enacted should be consistent with the pro-competitive, deregulatory, and national policy goals Congress articulated in the 1996 Act, and it is against those objectives that I will consider the present bill.

Before addressing more specifically the bill before us, I do want to sketch briefly what I believe, ideally, communications reform legislation should include.[1] In light of the realities of the current communications marketplace, ideally, Congress would jettison most of the current statue, that at its core is grounded in many different service definitions ("telecommunications", "information service", "cable service", "mobile service", and so on). These existing service definitions are based on what I have called "techno-functional constructs."[2] I use this term because the service definitions are all tied

[1] Not surprisingly, much of what I sketch here is embodied in the work of PFF's DACA Project. For all of the reports and other materials that have been published thus far in connection with the project, see http://www.pff.org/daca/.

[2] See Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 FED. COMM. L. J. 103 (2006).

to some combination of technical characteristics or functional capabilities. In a world of convergence driven by technological change, drawing distinctions for regulatory purposes between and among the variously-denominated services becomes a largely metaphysical exercise.[3]

In today's digital age, this regime of so-called "stovepipe" regulation should be replaced by a new market-oriented regulatory paradigm based on competition law principles grounded in antitrust-like jurisprudence enforced by the Federal Communications Commission.[4] Under the DACA proposal, most of the FCC's regulatory actions would be subject to an "unfair competition" standard—akin to the standard employed by the FTC under the Federal Trade Act. This unfair competition standard, which would be at the heart of the new communications law, would anchor the FCC's regulatory activities firmly in market-oriented competition analysis. I will say more about this proposed regime, which like antitrust law, makes competition and consumer welfare paramount, when I discuss Title II, the bill's broadband provision. Here I just want to add that, it light of the radical marketplace changes I have described, ideally Congress would enact a comprehensive reform of the nation's communications laws that would include, in addition to the change in regulatory paradigm, (1) alteration of the division of jurisdictional authority that recognizes the increasingly national and international nature of communications; (2) reform of the universal service system of subsidies that recognizes the extent to which consumers in rural areas and low income consumers have opportunities to avail themselves of new, lower-cost communications technologies than those traditionally supported by the subsidies; and (3) reform of spectrum policy that recognizes that increased flexibility of use and more secure property-like rights leads to more efficient and consumer-welfare enhancing use of this valuable resource.[5]

II. The Net Neutrality Provision

Now I want to turn to the bill before us. Although it is only two pages, I first want to address Title II, "Enforcement of Broadband Policy Statement." This section is very important, in a fundamental sense, to the future development of the broadband and Internet markets, and, indeed, to the future of sound communications law reform. In essence, this section provides that the FCC has authority to enforce, through adjudications and not rulemakings, the four "connectivity" principles the agency adopted in August 2005. The bill provides that if "the Commission determines that such a violation [of the principles] has occurred, the Commission shall have authority to adopt an order to require the entity subject to the complaint to comply with the broadband policy statement and the principles incorporated therein."[6]

The FCC's September 2005 policy statement describes the broadband principles as follows: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice; (3) consumers

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[3] Id. And see Randolph J. May, *The Metaphysics of VoIP*, CNET News, January 5, 2004, available at http://news.com.com/The+metaphysics+of+VoIP/2010-7352_3-5134896.html.

[4] For a bill that embodies this new market-oriented regulatory paradigm, see S. 2113, the "Digital Age Communications Act," introduced by Sen. Jim DeMint on December 15, 2006. Sen. DeMint's bill is modeled on the recommendations and legislative proposal contained in the DACA Regulatory Framework Working Group Report, Release 1.0, which may be found at http://www.pff.org/issues-pubs/other/050617regframework.pdf.

[5] For the DACA Project's proposal in each of these areas, see Report from the Working Group on Federal-State Framework, Release 2.01, at http://www.pff.org/issues-pubs/books/051026daca_fed_state_report2.01.pdf;; Proposal of the Universal Service Working Group, Release 2.0, at http://www.pff.org/issues-pubs/books/051207daca-usf-2.0.pdf; and Report from the Working Group on New Spectrum Policy, Release 1.0, at http://www.pff.org/issues-pubs/books/060309dacaspectrum1.0.pdf.

[6] Proposed new Section 715 (b)(2).

are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and services providers, and content providers.[7] (Note here that this last principle, as I read it, appears to extend the FCC purview to application and content providers, such as Google, EBay, and Yahoo, perhaps providing a basis for complaints to the FCC that the market segments in which they participate are not "competitive".) When adopted, the Commission characterized the principles as "guidance", not rules in the sense of positive law, although it said that "to ensure consumers benefit from innovation that comes from competition, the Commission will incorporate the above principles into its ongoing policymaking activities."[8]

The FCC's principles embody the bundle of access rights that are often referred to as "Net Neutrality" mandates. I want to explain first why it is far preferable for Congress **not** to enact into law any specific net neutrality provision mandating access rights and non-discrimination obligations. And then I want to explain why, assuming for the sake of argument that it nevertheless does so, any such net neutrality-specific provision, such as the one included in the bill, should be revised as I suggest below.

It is important to emphasize again here the increasing competitiveness, and the existing contestability, of the broadband marketplace, makes it very unlikely that broadband operators will take any actions of the type intended to be prohibited by the net neutrality prohibitions which consumers value. If they did, consumers would switch broadband providers. Broadband operators are in the distribution business. Consumers don't demand "bare" broadband by itself, of course; they want the content that broadband distribution provides. If they are going to invest billions of dollars building out new broadband networks, it is safe to assume that the operators will not find it in their interest to block or impede subscribers from accessing services and content that the customers find valuable.

It is also true that when broadband operators contemplate investing billions of dollars in new high-speed networks, the ability to bundle distribution with content, and to enter into efficient business arrangements with unaffiliated content and applications providers, may be crucial to providing the incentive to invest. In this regard, the ability of an operator to differentiate its service from that of another operator, or even in some circumstances to discriminate among unaffiliated providers, may be critical to the decision to invest in new networks and service applications. As the members of the DACA Regulatory Framework Working Group explained in a recent joint statement: "Competitive markets often involve legitimate price and service discrimination, and network owners often are pursuing legitimate technological or business objectives in particular cases."[9] To take one example, new broadband wireless entrant Clearwire apparently gave Bell Canada exclusive rights to distribute VoIP over Clearwire's broadband network in exchange for a $100 million investment by Bell Canada. Would consumers be better off if this "discrimination" were prohibited and Clearwire's new network not built? I don't think so.

In any event, although we have yet to see more than a handful of claimed instances of abuse occur, my purpose here is not to argue that, in today's environment, there might not be some instances in which, due to the particular marketplace circumstances, we ought to be concerned about discriminatory conduct or denial of access rights of the type encompassed by the FCC's broadband principles. Perhaps the oft-cited case involving

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[7] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, FCC 05-151, CC Docket No. 02-33, September 23, 2005.

[8] Id. Indeed, shortly thereafter, when the agency approved the mergers of SBC Communications, Inc. and AT&T Corp. and Verizon Communications Inc. and MCI, it incorporated into its approval a condition requiring that the merger applicants "conduct business in a way that comports with the Commission's Internet policy statement…."

[9] See a Statement of the DACA Regulatory Framework Group attached as Appendix A.

Madison River, in which the dominant local telephone company allegedly refused to provide access to its network to independent VoIP providers is just such an instance. My purpose here is to suggest that it is important that Congress not enact a provision that is—or that even possibly will be turned into—a broad, overly-inclusive net neutrality mandate. Rather, if Congress insists on dealing with this issue in this bill, it should incorporate into the provision the unfair competition standard that is at the heart of PFF's DACA regulatory framework. And it should specifically tie the FCC's authority to enforce the broadband principles to violations of the unfair competition standard.

The bill already adopts one of the key elements of the DACA recommendation in that the Commission must proceed through adjudication in deciding whether the broadband principles have been violated. Because rulemakings, especially as the FCC has conducted them in the past decade or so, often are interminable proceedings that, when completed, lead to overly broad and vague anticipatory prohibitions, the bill's preference for case-by-case adjudications is very commendable. The Committee might consider imposing a time limit upon the Commission for deciding complaints to ensure that net neutrality-like complaints are decided in a timely fashion, and it might make clear that the agency has the authority, upon a strict showing that there is a substantial likelihood the complainant will prevail on the merits and will otherwise suffer substantial and irreparable harm, to issue administrative injunctive relief, pending the prompt final decision.

While the preference for adjudicatory proceedings is positive, alone it is not sufficient to ensure that the new law will not be interpreted by the agency, or by the courts upon review of the agency's decisions, in a way that is essentially equivalent to traditional common carrier principles. Indeed, that is what the net neutrality advocates seek. The hallmark of common carriage is the obligation not to discriminate and to charge "reasonable" rates. In effect, it is a very short (or non-existent) leap from enforcing the principle that consumers are entitled to access any content of their choice to determining that the provider may not differentiate its service from another provider by favoring some content and applications over others. Such common carrier regulation may have been appropriate in an era generally characterized by monopolistic service providers, but it is not appropriate in today's competitive broadband environment. As explained above, in a competitive marketplace, imposing common carrier-like obligations stifles investment and innovation and puts a drag on the overall economy.

Therefore, the Committee should revise the broadband section to provide that the FCC may find a violation of the broadband principles only if it finds that the broadband operator has committed an unfair competitive practice. An unfair competitive practice should be defined as an act that presents "a threat of abuse of significant and non-transitory market power as determined by the Commission consistent with the application of jurisprudential principles grounded in market-oriented competition analysis" such as that commonly employed by the FTC and the Department of Justice in enforcing the antitrust law. Incorporation of this competition standard will force the FCC to ground its decisions in rigorous economic analysis based on the marketplace realities at the time of the complaint. Under the specific circumstances of the case, the FCC would examine factors such as the number of existing and potential competitors, barriers to entry, technological dynamism in the markets at issue, and impacts on investment and innovation. Thus, for example, in a case such as Madison River, the agency might well find that that the complainant has proved an anticompetitive practice that should be remedied, while in the Clearwire example, the agency might well determine that under those circumstances that the exclusive arrangement does not constitute an anticompetitive practice. Moreover, if the agency does find that an unfair competitive practice has been committed, in the adjudicatory proceeding that the bill wisely envisions, it can tailor the remedy to fit the circumstances. So, in conclusion, if the broadband section is to remain in the bill despite my recommendation that it not be included, a competition standard

such as I have suggested should be married with the requirement for case-by-case adjudications.

III. Video Competition

The section of the bill creating a national franchise for cable operators[10] is a positive step that will further enhance and speed up the development of competition in the multichannel video market and, more broadly, the broadband market. Harking back to the stated goals of the 1996 Act that I mentioned earlier—pro-competitive, deregulatory, and a national policy—the video section generally furthers those goals. Nevertheless, in light of the competition that presently exists and which will continue to develop, the Committee should consider going further to reduce the regulatory requirements applicable to the cable operators, especially in the area of content regulation, where the First Amendment rights of the providers are implicated. And, once it establishes a national framework for cable operators applicable to new entrants and incumbents, as much as possible, it should apply to them in like manner.

Competition in the video marketplace has been increasing steadily over the past decade or so. I went back and examined the FCC Annual Video Competition Report that was issued in January 2000. There, while noting that cable and satellite operators dominated the marketplace, the FCC stated that the following entities were also providing video programming alternatives in some places: wireless cable operators, SMATV systems, local telephone companies, Internet video, home video sales and rentals, and electric utilities. Obviously, not all of these entities (for example, electric utilities or local telcos) were meaningful competitors or even, at that time, exerted meaningful pressure on the market as potential competitors. But, looking ahead, it was easy for the FCC to conclude then that, "[t]he technological advances that will permit MVPDs to increase both quantity of service (ie., an increased number of channels using the same amount of bandwidth or spectrum space) and types of offerings (e.g. interactive services) continue."[11]

Fast forward to this year. In its 12th Annual Video Competition Report, the FCC recently concluded:

> In this year's Video Competition Report, the FCC finds that the competitive MVPD market continues to provide consumers with increased choice, better picture quality, and greater technological innovation. The report concludes that almost all consumers may opt to receive video services from over-the-air broadcast television, a cable service, and at least two DBS providers. In addition, a growing number of consumers can access video programming through digital broadcast spectrum, fiber to the node or to the premises, or video over the Internet. Moreover, once consumers have selected a provider, technology such as advanced set-top boxes, digital video recorders, and mobile video services give them even more control over what, when, and how they receive information. Furthermore, many MVPDs offer nonvideo services in tandem with their traditional video services.[12]

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[10] It is useful to have in mind that the bill retains the existing "stovepipe" definitions to which I referred earlier, even though convergence is rendering them obsolete. In today's digital environment the traditional "cable operators" such as Comcast provide voice and data communications over the same broadband "pipes" that they provide video programming, and the new "cable operators" such as Verizon will provide video over the same digital broadband pipes that carry voice and data communications. These services that now go by the name of video, voice, and data are all carried in the same digital stream and are represented by different 1s and 0s traveling along together.

[11] Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 99-230, FCC 99-418, January 14, 2000.

[12] News Release, "FCC Issues 12th Annual Report to Congress on Video Competition," February 10, 2006.

So, we have seen the video marketplace become increasingly competitive over the past decade, due largely to technological advances. But there is no doubt that the market will become even more competitive—even more quickly—if national franchises are available as an option to replace the more than existing 30,000 local franchising authorities ("LFAs"). In the past, in granting and overseeing franchises to cable operators, the LFAs played a role akin to a traditional public utility regulator. While they served other claimed purposes as well, such as managing the cable operators' use of public rights-of ways and imposing social obligations such as making available free of charge Public, Educational, and Government ("PEG") channels and institutional facilities for government use, in essence the LFAs primarily were seen by the local governments as a way to constrain market power. This public utility-type regulatory function demonstrably is no longer necessary. Under a general national franchise regime such as that proposed in the bill, the authority of the LFAs to manage ROWs can still be maintained and properly constrained, and Congress can make judgments concerning, whether in the current and anticipated market environment, it is consistent with sound policy to maintain the non-economic regulatory social obligations.

While endorsing the national franchise approach, and commending the Committee for avoiding the imposition of unnecessary build-out requirements, here are some suggestions to consider for improving the bill further:

- Once a decision is made to implement a national franchise regime in light of the changed competitive environment and lack of need for traditional economic regulation, it is not clear why the LFA should be able to petition to revoke a national franchise obtained by an incumbent cable operator if no new competitor provides service in the franchise area during a one year period. There is a sound policy basis for providing the national franchise option that is not dependent on whether a particular competitor enters or remains in the market.
- Again, in light of the changes in the competitive environment, it is time to consider eliminating the PEG and institutional network mandates. In an environment in which there are a multiplicity of information sources for educational and government programming activities, the rationale for maintaining that "cable operators", incumbent or otherwise, (as opposed to local newspapers, Internet sites, broadcasters, etc.) must turn over their facilities for PEG channels is very weak. Whatever the original merits of the extraction of these channels for public use, the purposes for which they are intended can be met—and almost certainly are being met today—in the free marketplace absent government compulsion. Certainly government mandates on private communications systems to carry particular types of programming implicates First Amendment free speech interests. And the PEG mandates, along with the mandate for continued support of the institutional networks of the localities implicates the property rights of the private operators under the Fifth Amendment. I suggest that, in the competitive marketplace environment that is now a reality, increased sensitivity to these free speech and property-rights constitutional considerations by Congress will also point the way towards sound communications law and policy.

IV. Conclusion

The Committee should be commended for the substantial progress it has made since the earlier two staff drafts in proposing a bill that will represent sound communications policy. As for the Broadband Policy section, it would be far preferable for Congress to do nothing at all now to include a net neutrality-specific provision in the bill. There certainly have not been more than a few scattered instances of alleged marketplace abuses. Moreover, in the increasingly competitive broadband marketplace, there is no reason to

anticipate that broadband operators will not be responsive to making available services that consumers value. Assuming for the sake of argument that Congress is intent on including a net-neutrality-specific provision, however, it should explicitly tie enforcement of the FCC's broadband principles to determinations made under a market-oriented unfair competition standard such as the one I suggest in my testimony. Absent clearly tying any FCC authority to a competition-based standard that will require the FCC to undertake a rigorous fact-based economic analysis on the particular marketplace circumstances at the time, there is a great danger that enforcement of the access mandates at the core of the broadband principles will turn into a general common carrier mandate for broadband operators. Extending the non-discrimination obligations and rate regulation requirements that are hallmarks of a common carrier regime and which may have been appropriate in a monopolistic narrowband environment to the competitive broadband era will certainly stifle new investment and innovation and impose an overall drag on the nation's economy.

In light of the competition that already exists in the video marketplace, and the potential for even more competition from telephone companies and other new entrants, there is no longer any rationale for local franchising authorities to play a public utility-type economic regulatory role. This is true for new entrants such as the telephone companies and for incumbent cable operators alike. The proposal for a national franchise will speed the development of further competition. At the same time, the Committee should consider further improvements in the video section of the bill suggested in my testimony.

ATTACHMENT A

The Digital Age Communications Act's Regulatory Framework and Network Neutrality

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A Statement of the DACA Regulatory Framework Working Group∗

Randolph J. May
James B. Speta
Co-Chairs

Kyle B. Dixon
James L. Gattuso
Raymond L. Gifford
Howard A Shelanski
Douglas C. Sicker
Dennis Weisman
Members

One of the hottest issues in the current telecommunications reform debate is the discussion of "Network Neutrality," which generally refers to a nondiscrimination mandate for all broadband Internet networks similar to the common-carrier rule that applied to traditional telecommunications services in a monopolistic era. Most of the legislative proposals for telecom reform include a Network Neutrality rule,[1] and the FCC

∗This statement is adapted form remarks delivered by James B. Speta at the March 9, 2006 Digital Age Communications Act Conference in Washington, DC.

[1] The most recent bill to be introduced is S. 2360, Senator Ron Wyden's "Internet Non-Discrimination Act of 2006." This bill provides that a network operator shall not "interfere with, block, degrade, alter, modify, impair, or change any bits, content, application or service transmitted

in 2005 issued a policy statement in which it backed a version of Net Neutrality principles.[2] The exception to this trend is Senator Jim DeMint's "Digital Age Communications Act."[3]

Senator DeMint's bill echoes much of the position taken by the DACA Regulatory Framework Working Group.[4] This release explains the general structure of the DACA proposal, and explains why it provides a better framework for dealing with Network Neutrality issues. In brief, DACA adopts an "unfair competition" standard which is based on competition law and economics and which is robust enough to deal with truly anticompetitive instances of exclusion on the Internet, but without prejudging business practices that may spur investment and deployment of new facilities and services. DACA's case-by-case approach to Network Neutrality is superior, because it avoids thickets of ex ante rules while maintaining the availability of ex post relief.

The DACA Regulatory Framework In General

The DACA framework is designed to respond to two well-known and, in our view, largely incontestable developments. First, communications markets are increasingly competitive. Although that competition is not perfect and does not mirror the stylized markets of microeconomics textbooks with very large number of competitors, technological developments have increased – and are likely to continue to increase – competition in communications. Second, those same technological developments mean that service-based regulatory categories – one kind of regulation for telecommunications carriers, another for information services, and another for cable services – are no longer sustainable.[5]

The DACA is a technologically neutral regulatory paradigm, in that the Federal Communications Commission is given the same regulatory authority over all electronic communications networks. That regulatory authority is two-fold. The agency's principal authority is to punish and prevent "unfair methods of competition," which is a phrase intentionally borrowed from the Federal Trade Commission Act. The core idea is to punish and prevent practices that violate competition law principles (or that potentially would do so). Thus, DACA charges the agency to condemn "practices that present a threat of abuse of significant and non-transitory market power" consistent with market-oriented competition principles.[6]

Beyond the general incorporation of competition law principles, DACA also states that it is an unfair method of competition to substantially impede the interconnection of public communications facilities and services in circumstances in which the denial of interconnection causes substantial harm to consumer welfare. This "interconnection authority" is not necessarily dependent on traditional antitrust doctrine. Given the result of the *Trinko* case[7] and the importance of interconnection in communications markets, the DACA provides separate authority for the FCC to order interconnection. But this

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over the network of such operator." And it also provides that "a network operator shall…offer just, reasonable, and non-discriminatory rates, terms, and conditions" for all its broadband services.

[2] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, FCC 05-151, CC Docket No. 02-33, September 23, 2005.

[3] S. 2113, Digital Age Communications Act, December 15, 2005. S. 2113 embodies the proposals released by The Progress and Freedom Foundation's Digital Age Communications Act ("DACA") Regulatory Framework, Federal-State Relations, and Universal Service Working Groups.

[4] *See* Proposal of the Regulatory Framework Working Group, Digital Age Communications Act (Rel. 1.0, June 2005) (available at http://www.pff.org/daca).

[5] *See, e.g.*, Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Poilicy*, 58 FED. Com. L. J. 103 (2006).

[6] DACA § 4(a).

[7] *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

authority, under DACA, must still be linked to a theory of consumer welfare.[8] It is important to recognize that net neutrality is linked to the welfare of independent content and applications providers, but not to a sound theory of consumer or aggregate welfare. Even the most nuanced versions of network neutrality limit a network's ability to charge an application that imposes comparatively high costs on a network accordingly, leaving the network to recover at least some of those costs through subscription prices paid by consumers. Net neutrality thus risks being regressive: relatively low use consumers within a service tier may end up subsidizing those consumers whose use imposes relatively high costs on the network.

A last, general point about DACA: the regulatory framework is expressly tilted towards resolving competition problems that arise through adjudication and *ex post* remedies. The agency is still given rulemaking authority, although it must meet a higher evidentiary burden before promulgating rules. But the statute contemplates, and we prefer, the agency to act not through the development of a thicket of rules, but through case-by-case considerations.

Net Neutrality Claims Under the DACA Framework

Although there is some – indeed, it is fair to say, much – disagreement about how a network neutrality rule would operate in practice, such a rule is essentially an attempt to impose on the Internet the sort of nondiscrimination rule that traditional common carrier regulation has long imposed on telephone companies. The supposed point of network neutrality is to ensure access for applications and content providers, against the alleged incentives that network providers might have to deny or degrade access to certain unaffiliated content and services.

DACA proposes to handle these issues without the necessity of a specific rule, and without the need for a blanket rule that tries to anticipate every imaginable harm, and which would present opportunities for regulatory litigation. Antitrust law and economics has a well-developed body of learning about acts of vertical foreclosure – which is what denials of access would be.[9] Network neutrality may be a new label, but it is just a specific example of a more general competition issue with which there is over a century of enforcement experience and accumulated knowledge. Antitrust analysis takes into account the possibility of foreclosure, but also looks on a case-by-case basis for justified or efficient business arrangements. Competitive markets often involve legitimate price and service discrimination, and network owners often are pursuing legitimate technological or business objectives in particular cases. The "unfair competition" prohibition in DACA provides sufficient authority for the FCC to condemn and prevent anticompetitive violations of network neutrality. Indeed, DACA goes beyond antitrust law by giving the FCC authority to regulate vertical interconnection where necessary to protect consumers. For Congress to legislate such interconnection in advance of actual market experience to justify its necessity risks economic harm to consumers and producers—harm that has not been adequately considered in the case for network neutrality. An ex ante approach to actual harm, backed by the FCC's proposed authority under DACA, provides a more targeted approach to real harms. To take only the most famous case to date of a Network Neutrality complaint, the Madison River foreclosure of a competing VoIP provider,[10] antitrust analysis would handle this as a classic monopoly

[8] DACA § 4(b).

[9] For one excellent summary of the economics as applied to Internet access, *see* Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 Harv. J.L. & Tech. 85, 117-18 (2003).

[10] In the Matter of Madison River Communications, LLC, 20 F.C.C. Rcd. 4295 (2005).

maintenance scenario. At the same time, DACA's case-by-case approach preserves the space companies need to develop new network facilities and services and to enter into new business arrangements.

In addition, DACA's interconnection authority would also achieve a substantial amount of the same openness that network neutrality proponents claim to be seeking. In particular, net neutrality would allow applications and content providers to reach users of all interconnected carriers, so long as they are able to reach a negotiated agreement with some carrier. The necessity of one negotiated agreement is an important check on regulatory opportunism, however. It channels efforts at entry into the marketplace and away from litigation at the FCC.

Conclusion

Given that DACA has the analytic power and the regulatory tools necessary to handle truly anticompetitive network neutrality issues, institutional design becomes all important. And the institutional design of the DACA framework and the way that it would handle net neutrality issues comes back to its fundamental premises. One of DACA's fundamental premises is that, given developing competition, an extensive web of *ex ante* rules would have unintended consequences that would harm consumers and likely stifle markets. DACA is also premised on the view that infrastructure providers will act, in general, to promote applications and services that consumers want. Consumers do not purchase bandwidth for its own sake; they buy connections if those connections provide services and applications that consumers want.[11]

And so, if the evidence supports the requisite conditions – that the markets will be reasonably competitive, that the risks of truly anticompetitive actions are reasonably small, and that antitrust-based competition analysis is powerful enough to address it when it happens – then DACA is the right framework through which to address net neutrality.

MR. UPTON. Thank you, Joe.

Mr. Makawa?

MR. MAKAWA. Thank you, Mr. Chairman.

I will get right to it. I am CEO and Co-Founder of the Africa Channel and I come before you with probably one of the most compelling media projects of our generation. The reason I say that, I am one of those guys that was working in the garage five years ago to try to get something like this off the ground.

The Africa Channel is everything the political media and consumer landscape in this country is ready to engage and to experience. I have got something to show you in 90 seconds.

[Video]

[11] For this argument, *see, e.g.*, James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 Yale. J. on Reg. 39 (2000).

Chairman, the Africa Channel is here in the name of diversity. America stands for diversity. Our cable, telephone, and satellite companies say they understand the importance of diversity. We embrace that position, support that position, and pray that we are not getting hollow promises and lip service. The landscape has got to change. Africa is about diversity. All our roots, collectively here take us back there. It is the cradle of mankind. It is the most diverse place on earth. With that diversity comes a host of realities like the celebration of life, conflict, tragedy, vibrant cultures, adventure, wildlife, dance, music, history, food, tranquility, all part of the African experience unmatched or experienced anywhere else on the planet, something truly unique.

Double click on any one of these realities and you get some of the most compelling stories and pictures to share with the rest of the world. In this case, the United States of America. It is this experience that as an independent network, we have been able to capture the imagination of cable companies that have committed to carry us, in this case COX and COMCAST. We applaud them for that, but they must do more. And the incumbent telcos must do more. More markets, audiences that we are reaching, are elated and so are the cable operators.

So where are we with all the other carriers? We are either under discussion or negotiation depending on who you are dealing with. The process is either swift or moves at the speed of molasses which is why we embrace competition. Competition is good, it is healthy. It means choice and access for everyone. That is the American way. One or two gatekeepers is unacceptable. It is downright un-American. New technologies are opening up bandwidth, something that continues to challenge the cable companies. We just want a level playing field. We want the opportunity to compete on every platform. Whether that be cable, telco, satellite, broadband, wireless, and future platforms still to come. We have enough fresh quality content to fill all the digital pipes. Case in point, it does not matter whether the consumer is in Detroit, New York, or Chicago, every consumer should have the opportunity to access what we have to offer. If the telcos are going to be in Washington, D.C., why shouldn't all consumers of Washington, D.C. have access to that platform?

We have almost 1800 hours yet to be seen in this country, a case where opportunity meets the right cause. Let us not forget the Africa Channel is not the problem, we are part of the solution. In demystifying Africa, people start to become aware of how important Africa is to America's future, its resources, energy, and ultimately security. We are a catalyst in ramping up trade and commerce. Our channel brings forth access for those with a hunger to learn, those with a hunger for history, those with a hunger for business opportunities, those with a hunger to

simply connect and understand, those who also want to be entertained. We are here doing something positive to that end. We have done everything the MSOs and the telcos have asked us. Bring forth a quality product they say. Be relevant to the community. Have a business model that makes sense and make sure you can market your product and add value to our business. To all of the above, we can, we are, and we will.

I thank you.

[The prepared statement of James Makawa follows:]

PREPARED STATEMENT OF JAMES MAKAWA, CO-FOUNDER AND CHIEF EXECUTIVE OFFICER, THE AFRICA CHANNEL

I COME BEFORE YOU WITH ONE OF THE MOST COMPELLING MEDIA COMPANIES OF OUR GENERATION.

THE AFRICA CHANNEL IS EVERYTHING THE POLITICAL, MEDIA AND CONSUMER LANDSCAPE IN THIS COUNTRY IS READY TO ENGAGE AND EXPERIENCE.

(ROLL VIDEO TAPE: Running time 1:20secs.)

THE AFRICA CHANNEL IS HERE IN THE NAME OF DIVERSITY.

AMERICA STANDS FOR DIVERSITY. BOTH CABLE, TELEPHONE AND SATELLITE COMPANIES SAY THEY UNDERSTAND THE IMPORTANCE OF DIVERSITY.

WE EMBRACE THAT POSITION, SUPPORT THAT POSITION AND PRAY THEY WE ARE NOT GETTING HOLLOW PROMISES OR LIP SERVICE.

AFRICA IS ABOUT DIVERSITY. ALL OUR ROOTS TAKE US BACK THERE…..IT IS THE MOST DIVERSE PLACE ON EARTH.

WITH THAT DIVERSITY COMES CELEBRATION, CONFLICT, TRAGEDY VIBRANCY IN THE NAME OF CULTURE, ADVENTURE, WILDLIFE, DANCE, MUSIC, HISTORY, FOOD, TRANQUILITY…..ALL PART OF THE AFRICAN EXPERIENCE…UNMATCHED OR EXPERIENCED ANYWHERE ELSE ON THE PLANET.

DOUBLE –CLICK ON ANY ONE OF THESE CATEGORIES AND YOU GET SOME OF THE MOST COMPELLING STORIES AND PICTURES TO SHARE WITH THE REST OF THE WORLD…..IN THIS CASE THE UNITED STATES OF AMERICA.

IT IS THIS EXPERIENCE THAT AS AN INDEPENDENT NETWORK WE HAVE BEEN ABLE TO CAPTURE THE IMAGINATION OF CABLE COMPANIES THAT HAVE COMMITTED TO CARRY US. IN THIS CASE COX AND COMCAST. ALL THE OTHER PLAYERS ARE UNDER DISCUSSION OR NEGOTIATION. DEPENDING ON WHO YOU'RE DEALING WITH, THE PROCESS IS EITHER SWIFT OR MOVES AT THE SPEED OF MOLASSES.

WHICH IS WHY WE EMBRACE COMPETITION……COMPETITION IS GOOD, ITS HEALTHY, IT MEANS CHOICE AND ACCESS. THAT IS THE AMERICAN WAY. ONE OR TWO GATEKEEPERS IS UNACCEPTABLE…..IT IS DOWNRIGHT UNAMERICAN.

NEW TECHNOLOGIES ARE OPENING UP BANDWIDTH, SOMETHING THAT CONTINUES TO CHALLENGE THE CABLE COMPANIES. WE JUST WANT A LEVEL PLAYING FIELD. WE WANT THE OPPORTUNITY TO

COMPETE ON EVERYPLATFORM…..WHETHER THAT BE CABLE, TELCO, SATELLITE OR BROADBAND.

IT DOES NOT MATTER WHETHER THE CONSUMER IS IN DETROIT, NEW YORK, WASHINGTON DC , LOS ANGELES OR ST. LOUIS MISSOURI. EVERY CONSUMER SHOULD HAVE THE OPPORTUNITY TO ACCESS WHAT WE HAVE TO OFFER……IF THE TELCOS ARE GOING TO BE IN WASHINGTON DC WHY SHOULD'NT CONSUMERS IN ALL OF WASHINGTON DC HAVE ACCESS TO THEIR PLATFORM?

WE HAVE ALMOST 1800 HOURS OF CONTENT YET TO BE SEEN IN THIS COUNTRY….A CASE WHERE OPPORTUNITY MEETS THE RIGHT CAUSE.

LET US NOT FORGET, THE AFRICA CHANNEL IS NOT THE PROBLEM BUT PART OF THE SOLUTION WITH DIVERSITY.

IN DEMISTYFYING AFRICA….PEOPLE START TO BECOME AWARE OF HOW IMPORTANT AFRICA IS TO AMERICAS FUTURE….ITS RESOURCES, ENERGY AND SECURITY.

OUR CHANNEL BRINGS FORTH ACCESS FOR THOSE WITH A HUNGER TO LEARN, THOSE WITH A HUNGER FOR HISTORY, THOSE WITH A HUNGER FOR BUSINESS OPPORTUNITIES THOSE WITH A HUNGER TO SIMPLY CONNECT AND UNDERSTAND

WE ARE HERE DOING SOMETHING POSITIVE TO THAT END. WE HAVE DONE EVERYTHING THE MSO'S AND TELCOS HAVE ASKED OF US. BRING FORTH A QUALITY PRODUCT, BE RELEVANT TO THE COMMUNITY AND HAVE A BUSINESS MODEL THAT MAKES SENSE AND MAKE SURE YOU CAN MARKET YOUR PRODUCT AND ADD VALUE TO OUR BUSINESS.

TO ALL OF THE ABOVE, WE CAN….WE ARE… AND…. WE WILL. VISIT OUR WEBSITE AT WWW.THEAFRICACHANNEL.COM AND YOU SEE WHY WE ARE READY FOR BUSINESS AND WELCOME AN OPPORTUNITY TO PARTICIPATE ON A LEVEL PLAYING FIELD IN THIS DIGITAL AGE.

THANK YOU.

MR. UPTON. Well thank you very much.

And I know Ms. Rodriguez you have got to take a conference call shortly so you are watching the clock so--

MS. RODRIGUEZ-LOPEZ. Actually--

MR. UPTON. You did it already?

MS. RODRIGUEZ-LOPEZ. No.

MR. UPTON. I appreciate your testimony.

A couple of question that I have, I do not know that I will take my whole five minutes. Ms. Johnson, as I listened to your testimony, as I listened to Ms. Rodriguez-Lopez's testimony, to a degree they were very much on the same page. Now you are talking about diversity and choice, and actually, Mr. Makawa as well. The need for rapid deployment, it is equally important that we have competition availability. Obviously, we need to make sure that there are strong non-discrimination policies and I will bet that Mr. Rush is going to want to talk about that, so I will not steal his thunder.

Ms. Johnson, the one thing that I did not hear you say in your comments, as we look towards trying to see that competition, is your comment specifically on the draft that we released earlier this week. Do

you think that we, it is a good draft, that it accomplishes the very things that you sought in your testimony?

MS. JOHNSON. I think that it is an extraordinary start. I and my members are excited about the draft. We believe that it will open up markets, that it will allow for expeditious investment. Our members are negotiating as well with both cable and telecommunications infrastructure providers and believe that this will help initiate and jumpstart even more opportunities for us to provide that diverse content. As well as we look at the issue of and I know there has been quite a bit of discussion, while we do not consider ourselves experts with respect to the build-out requirements, we do look at market trends and do quite a bit of economic analysis. Our livelihood also depends upon those that take our service. And as we look at our minority communities, and I have heard lots of people talk about the high valued customer and in that they sort of assumed that that would not be minority communities, but as all of the surveys and all of the research that we have seen demonstrates that there is extraordinary buying power in those communities and to the extent that there are, that the companies are allowed to make the investment, that they too will be investing in our communities. So we are very encouraged by what we have seen to date.

MR. UPTON. Great, thank you.

Mr. Riddle, you may know that in an earlier hearing, I want to say it was last summer, we heard testimony from many of the same organizations that we heard today, that PEG channels were ably represented by one of my constituents, who is in the room actually sitting a little bit behind you, and met with him recently back in Kalamazoo. I advocated then at the hearing, as I do now, that I support PEG channels. I am interested in your thoughts as we, as part of our draft, you know, we added one percent on top of the five percent for gross to make sure that PEG channels are adequately funded. What is your sense, in terms of that in essence the mandate that we put into that as part of our bill with the addition on future years of adding additional channels as well?

MR. RIDDLE. I think overall it is the right move in the right direction. I think I am being instructed a little bit by a question I got by Senator Stevens when we testified. He only asked one question, which was how many channels do you want? And, you know, I thought about it and, you know, because he was proposing four. And I thought about it and I used to work in Manhattan and we had ten PEG channels more or less and it was entirely uncomfortable because of the large size of the population, and yet we have a lot of communities where two or three might be entirely adequate. So it occurred to us that we ought to set up a scale. Of course the numbers we are not discussing, but a scale both for funding and for channel capacity which would eliminate the need for

people to be able to have to go in and negotiate what is the specific community need that we would tie these to, you know, the size of the community or the size of the gross and that we would really make the commitment to try to stick around those kind of median, those sorts of numbers that you had discussed before either the one percent or in his case the four channels so that we are hovering around those numbers.

MR. UPTON. So as my time expires, you are pretty happy with that one percent that we added in the bill, and it was probably, if I could put words in your mouth, a surprise perhaps, pleasant surprise.

MR. RIDDLE. Because of what we had heard might have been happening, we were happy with that as it was. We would like to make some adjustments just to help the rural communities and the small towns so that if you are talking about one percent in a very small town, it might be hard to pay the rent with that, so you are talking about a small amount of money if you increase the percentage there but we think with the larger cities, they will kill me for this, but the one percent may get them close to being where a lot of their agreements are.

MR. UPTON. Thank you.

Mr. Markey? He is only moving because this mic does not work.

MR. MARKEY. Thank you, Mr. Chairman.

Ms. Johnson, welcome back.

MS. JOHNSON. Thank you.

MR. MARKEY. In a March 9 Technology Daily story you are quoted as saying that your group opposes a build-out requirement, but you said that your group's opposition on that would change if there is evidence of segments of the minority community seeking service but being denied it within a reasonable period of time. What is a reasonable period of time in your opinion for the Bells to serve the minority community in a city that they are deploying this new technology?

MS. JOHNSON. Sir, it would be, and I am not punting, but I guess I do not know what a reasonable amount of time would be in terms of an absolute number.

MR. MARKEY. Yes. Would 20 years be too long?

MS. JOHNSON. Would 20 years be too long to build-out to--

MR. MARKEY. To build-out to the minority community.

MS. JOHNSON. I would think that 20 years would be too long.

MR. MARKEY. Is ten years too long?

MS. JOHNSON. I would think that where we should focus is on where the market would take us. I think that--

MR. MARKEY. I know, but what I am saying is if the market does not go there and they just decide not to go there, is ten years too long for them to still build-out in the minority community? The cable companies

have built out the entirety of the cable community. Do you think ten years is too long for the Bells to have to build-out?

MS. JOHNSON. I do not think that there should be a number attached to the build-out requirement.

MR. MARKEY. But you say a reasonable period of time. What is reasonable?

MS. JOHNSON. I think that reasonable will be dictated by the circumstances.

MR. MARKEY. So you do not think we should actually be talking about any specific time frames then in the bill?

MS. JOHNSON. You know at first blush as I have watched the build-outs that have occurred in the areas where they have penetrated the market, they appear to have a very diverse build-out in terms of minority communities, in terms of full communities. So the process seems to be working.

MR. MARKEY. Okay. So should the local community have an ability to determine what is reasonable?

MS. JOHNSON. I think that the process has been outlined to date is a good start and that has a Federal process in place.

MR. MARKEY. A Federal process. Is your organization financially supported by the Bell companies in any way?

MS. JOHNSON. No we are not.

MR. MARKEY. At all?

MS. JOHNSON. Yes, and let me elaborate upon that, too. We are a relatively new organization.

MR. MARKEY. No, that is okay, I can go along with that answer. That is fine, thank you. And are you compensated in any way by the Bell companies?

MS. JOHNSON. I have a consulting firm that works for a variety of companies generally in the regulatory space we had--

MR. MARKEY. But are the Bell companies amongst those companies that--

MS. JOHNSON. Yes.

MR. MARKEY. --that pay you. Okay, thank you.

Let me ask you, Ms. Rodriguez-Lopez. You said that only one in eight Hispanic families have access.

MS. RODRIGUEZ-LOPEZ. Correct.

MR. MARKEY. So there has been plenty of opportunity here for the companies to reach the minority, the Hispanic community but they have not done so. Do you think that we should put in a time limit in terms of the company's responsibilities to reach the Hispanic community?

MS. RODRIGUEZ-LOPEZ. I have a little bit of a different take on that and my specific answer would be, I am really looking for equity in the deployment from day one.

MR. MARKEY. Right, I am with you.

MS. RODRIGUEZ-LOPEZ. Which is a little different. People are saying, well, I believe that they are going to reach the diverse markets. I just believe that we need to look at the markets--Hispanic, African American, low-income, urban, minority communities--and from day one say we are going into those communities because we could never reach every community as they deploy.

MR. MARKEY. Do you think that should be in the bill that they have that requirement or just leave it to the company to decide?

MS. RODRIGUEZ-LOPEZ. No, I would leave that to the great minds that are on that side.

MR. MARKEY. Thank you so much.

MS. RODRIGUEZ-LOPEZ. If it is possible to build that in as a principle then I would hope, but that has been what I have been articulating.

MR. MARKEY. I thank you. Well great minds are not thinking alike at this point in time. We are hoping we can get them all to agree on that. And this is--

MS. RODRIGUEZ-LOPEZ. They are not thinking alike here either.

MR. MARKEY. Yeah.

Mr. Makawa, you say in your testimony, you say if the telcos are going to be in Washington, D.C., why should not all consumers and all of Washington, D.C. have access to their platform. So do you support a requirement that would be built in the bill that the Bells would have to serve all parts of Washington, D.C.?

MR. MAKAWA. Absolutely.

MR. MARKEY. And would you support a provision here that required build-out to all parts of the community?

MR. MAKAWA. Absolutely.

MR. MARKEY. Excellent.

And Ms. Kenney, on the first panel I asked the head of the cable industry association, Mr. McSlarrow, whether he could pledge when cable operators get national franchises and have no local service obligations that incumbent cable operators have. One, would that they would not withdraw service from certain areas, two, would not fail to upgrade service and technology uniformly, three, would not raise rates on consumers in the part of town that did not have deployment by the Bell company in order to lower prices for those lucky enough to be on the good side of town, the wealthier part of town where the Bell company has chosen to serve. He would not pledge to any of those three

items. So in the absence of a build-out requirement ensuring service area parity so all consumers get the benefits and all providers compete across the franchise area isn't there great risk of harm to consumers there?

MS. KENNEY. Oh, absolutely Congressman Markey. I mean that is probably what is most concerning in this bill, the opportunity to look at video franchising and provide new competition to consumers is really exciting, but that competition has to come to everyone for people to truly benefit from it. And if it does not, then you have to at a minimum make sure that those consumers who are getting that competitive service are not harmed, and under this bill and based on Mr. McSlarrow's comments, it certainly seems like they would be.

MR. MARKEY. Okay, I thank you.

I thank you, Mr. Chairman.

MR. UPTON. Mr. Barton.

CHAIRMAN BARTON. Thank you, Mr. Chairman and I want to thank this panel for being so patient and waiting half a day to testify to five congressmen. But you have got five quality congressman and women here. I am telling you, you have got four of us that have been negotiating the bill for over a year and a half and Mrs. Blackburn is the author of a similar bill down in Tennessee and has been very involved in the negotiations in following them and has introduced her own bill along with, I think Mr. Inslee, so while you do not have a full subcommittee here, the people that are still here are very interested in what you have got to say.

Mr. May, your group is kind of a think tank I think. Would that be an adequate characterization?

MR. MAY. We are, exactly.

CHAIRMAN BARTON. Mr. Markey's premise in our negotiations was that these new entrants in the video services, almost by definition, were not going to try to serve the minority community for some reason and we went round and round with him on build-out requirements and uniform pricing requirements and things of this, in very honest, open dialogue. On the other hand, Mr. Rush who has a congressional district that probably is a majority minority district, I do not know that for a fact, but my guess is it probably is and has looked at the same set of circumstances and feels like, that at least the minority community that he represents is going to be well served by a national franchise with no build-out requirement or things like this.

From just a think tank economic perspective, what is your version of the reality with the Verizons and the AT&Ts and these new entrants, do you think they are going to go in and just serve white effluent America or do you think they are going to look at wherever if there is a large demand for these type of services, regardless of ethnicity or whatever, they are

going to serve where they can feel like they get the biggest take rate from the beginning?

MR. MAY. It is going to be exactly the latter of course, Mr. Chairman. I mean one thing I am sure of is that they have no interest in this competitive environment that we are now in. Basically I think while you were out of the room or--and in my written testimony, the video marketplace is already, you know, somewhat competitive or quite competitive. And this national franchise, which I think is a very positive step, will make it even more competitive than it already is at this time. And the basic fact is that none of these companies are going to make any judgment based on race, ethnicity, or anything like that. They are fighting for market share and they are going to go where the market is and they have incentives to do that. The danger is really in trying to regulate in that type of environment and dictate to them, you know, where to go first, exactly how quickly, and under what timetables you have to get there and assume that as smart as you are and even with the right Congress people in this room right now, that you are going to be able to know how to do that better than the marketplace, which will drive these companies in exactly the direction that you suggest.

CHAIRMAN BARTON. What is your view, Mr. May, of the number of new entrants that would tend to come into a market if you have an incumbent cable provider that is already there and you have a satellite provider that is already there. Do you, would the incumbent telephone company, who I tend to think might be the first new entrant, would a wireless entrant also tend to come in rather early or do you think the wireless guys are going to wait to see how the phone companies fair in this competition?

MR. MAY. I think in some of these markets that there will be room for the wireless guys to come in as well, and they might do that. You know, I think that it is just the, I think it is very positive to establish the national franchise and move away from the local franchises, which really were originally a way of getting what was thought to be a monopoly problem. Now it is obviously true that the cities need to manage their rights-of-way and you take care of that, well you can take care of it, but the franchises were really an economic regulatory device. We are in a situation now where with the competitors that exist and with the technology being as dynamic as it is to include wireless. I mentioned again in my earlier statement that, you know there are people, including my daughter for one, who watches television over her cell phone now. I mean there are people that are doing that. That is video competition. It is not perfectly substitutable. But the thing that I think you do not want to do is to dictate and try and define in advance what the parameters of that competition should be.

CHAIRMAN BARTON. Okay. I just have one final question Ms. Johnson. Tell me a little bit about what the Video Access Alliance is.

MS. JOHNSON. The Video Access Alliance is made up of independent networks, TV channels that are providing programming very similar to the Africa Channel of independent networks not affiliated with any of the providers. And our group serves as an advisory group, as well as, an advocacy group for their interests. We are extraordinarily interested in this process of video franchise reform because we see multiple platforms as a means for us to achieve greater carriage.

CHAIRMAN BARTON. So your group is primarily interested in providing support to get your channels carried by these as you call them platforms.

MS. JOHNSON. Absolutely.

CHAIRMAN BARTON. So it is not really a mouthpiece for the Bell companies or anything like that?

MS. JOHNSON. Absolutely not. We are interested in providing quality programming and we believe that if we are allowed to provide that quality programming that all consumers will benefit by lower rates, as well as having a diverse group of voices to be heard.

CHAIRMAN BARTON. Okay, thank you.

MS. JOHNSON. Thank you.

MR. UPTON. Mr. Rush?

MR. RUSH. Thank you, Mr. Chairman.

Ms. Johnson in, to be in addition to the Chairman's comments, I want to just ask you because I have a little concern that we do not send wrong messages here.

MS. JOHNSON. Sure.

MR. RUSH. There are most members of this committee and members of this body who accept contributions from all kinds of people, including the telephone companies, the Bells and almost every other industry that comes before this committee including the industries that have a legitimate interest in the discussions. And most take the positions that although we might accept campaign contributions from them, there is no way that those contributions dictate or influence our positions here. So my question to you is have you, are you here at the behest of any of the providers, any of your contractors or your ones that you consult with or are you at the behest of an independent organization representing their interests?

MS. JOHNSON. Yes, sir, I am here at the request and honorably here at the request of my members. My members are independent networks made up a diverse collection of entrepreneurs who are providing diverse rich content that adds value for all consumers.

MR. RUSH. And so any implications that you might be a spokesperson or a mouthpiece for any stakeholder in these discussions other than your independent providers would be absolutely incorrect. Is that--

MS. JOHNSON. Yes, sir, absolutely incorrect.

MR. RUSH. Okay. Let me just lead to the next question that I have. In your statement, now this is Ms. Kenney's statement, I am sorry, we will move onto Ms. Kenney very quickly. Ms. Kenney, in your statement and you talked about the anti-redline prohibitions, that the burden of proof should be placed on the cable providers. Do you think that this will strengthen the anti-redlining provisions of this bill if the-- and what do you mean by that?

MS. KENNEY. Well, first of all, we do not believe that anti-redlining provisions on their own are sufficient to actually prevent redlining. You know, cable has the act, currently has an anti-redlining provision in it as well. We have not seen redlining in cable to date because communities have had the ability to require build-out albeit over too slow of a time period, but redlining provisions in the absence of build-out we do not believe are effective.

Secondly, we would rather not see that redlining occur in the first place. We would rather not have to litigate for consumers to get access to competitive services. So flipping the presumption of proof, requiring a provider to demonstrate that they are not providing service in an area for reasons other than the income of that particular area would certainly make it easier for a community to demonstrate that redlining was or was not occurring. Otherwise, the community has to prove that income is the reason. There are lots of excuses we believe that providers can and have made in the past for why they have not provided a service in a particular area.

MR. RUSH. Mr. Makawa, would you give us some brief synopsis of your experiences in terms of how difficult it was for you to get the Africa Channel, get that on any kind of channel at all and service to provide it.

MR. MAKAWA. It is probably the most arduous journey I have ever been on to be perfectly honest and perfectly blunt. But nonetheless, independent channels trying to get on today, there is probably a handful of us and part of the reason I am for this specific direction that this body is taking is with all due respect to the cable companies when you walk into them, some of them have been very friendly but the first thing out of somebody's mouth when they say hello to you is we do not have any bandwidth. That is the first thing that is said. Now with all the technological geniuses that exist in this country, how is it that the toilet pipes are going to clog up? I do not understand it. So all of these folks have said, you know, one thing Congressman that people are not

unpacking here, it is not just the cable companies, it is not just the telcos, it has got to do with the price of content. The price of content has gone through the roof. And those are issues that have to be addressed. Now, I am perfectly comfortable coming before this body and saying to you that we did not take $100 million to launch this network, we launched this network for less than $8 million bucks. Those pictures you saw there, we did not spend $100 million on that. And when we walked into every cable company, we walk in and they say Africa, they go oh, it is going to be grainy, there is no value, and then all of a sudden the attitude changes. But we have had to walk in with a business proposal, number one, with content with high quality at a low price, and we have had to deliver things that other people have not even had to think about. The playing field is not level, it has got to change.

MR. RUSH. Okay, yeah.

Ms. Johnson, I have sat here all day and I have heard about these high performing clientele of this group that is the high preference group and the low preference group and I just wondered can you, I mean I kind of instinctively, you know, react to that because I know that in every instance in my community, where I live and where I work and what I represent, every time there is a new technology, the people I represent to my amazement become the greatest, they have the greatest market share of that technology. I remember when the cell technology for wireless phones first came. You know, all of a sudden they discovered that and the so-called low performing communities that there was a significant market, a great market, and I think that competitively speaking that that community has more cell telephones than any other community now. The same thing with cable, you know, the poor people, the African Americans, minority communities, they have the greatest market share in terms of cable television. Do you see any difference between what this bill offers and what has been the past experience and how do you react again to this distinction that folks have about minorities being low preference or low performing or have some kind of a low interest. How do you react to that kind of--

MS. JOHNSON. I react in a similar manner to which you have reacted and most of that reaction is based on real life experience, Sunday afternoon at my mamma's house understanding that the services that they use and that they value. And I understand that they are the high value customer and I understand the power that that brings. One of my concerns with respect to onerous build-out requirements is that, my first concern is what will that do to, or will that stifle the investment being made because, see, these people do not have a choice as to whether or not to invest that money. And then secondarily, let us assume that it doesn't stop at investment. What would that do to the cost of service? I

submit to you that that would increase the cost of service to even these high-value customers. Specifically to your question, many studies have shown, and if you will allow me, I will give a few stats, particularly with respect to the minority communities. Minorities have higher penetration rates for digital TV, premium channels, and are the best pay per view customers. Minorities are the top subscribers to premium channels including HBO and Showtime. Seventy-four percent of black urban cable users, 63 percent of Asians are users, and 61 percent Hispanic subscribe to more than one extra fee service, compared to 43 percent white. Blacks spend 59 percent on cable satellite, 20 percent more than whites. Blacks spend $27 on premium channels, 23 percent more than whites. I submit to you that if you are looking at the high-value customers that are looking for these services, that will receive these services, this is the community that will have the biggest benefit. And if you overlay that with new content--the gentleman with the Africa Channel talked about his offering--if you overlay the content competition which will help decrease the price of content and couple that with where the market will take you, I submit to you that all consumers will benefit but particularly African Americans.

MR. RUSH. In summation, you know, there is a real simple reason for it. The cable, these channels, they are the ones that offer programs that have, in their content, they have African Americans so they have more African American family shows, more African American music, and that is why your channel, the Africa Channel is going to really be quite a success if we can get it more broadly seen because of the fact that there is just a demand for more programs that feature African Americans. That is the reason why cable is such a success in African American communities, exactly the reason.

MR. UPTON. Thank you.

Mrs. Blackburn.

MRS. BLACKBURN. I know you all are all so glad to see me come around. That means I am the last one.

Ms. Johnson, I appreciate so much what you have had to say. I represent a little bit of Memphis, a little bit of Nashville in my district and have worked for many years with some of our content producers down there and also our content providers and do recognize the distinction and appreciate the distinction between the two of those. I actually have spent some time working on this issue as a small business issue. Mr. Makawa, as you were saying, it is entrepreneurs that have a dream. They want to get in there, they want to produce their product, they want to find an outlet for that product, they want access to the marketplace, they want access to consumers so that they can build a constituency for their programming. And it takes a lot of hard work. It

takes a lot of time. And when I do a town hall meeting in my district with all of these songwriters and producers and content great thinkers, as I like to say, or great creative community, one of the things I hear from them regularly is when in the world are you all going to put the pencil to the paper and free up this marketplace and start deregulating this thing and free up some of this bandwidth and open up these pipes and let us have more access to the marketplace. That is what we hear from them regularly.

So my question is I want to be sure I understand you all on this. Ms. Johnson, you all do not favor a build-out requirement. Is that correct?

MS. JOHNSON. That is correct.

MRS. BLACKBURN. Okay. Mr. Makawa, I was confused, I thought, I could not, I did not realize what you said. Do you favor build-out or do you not favor build-out requirements?

MR. MAKAWA. Yes, Ms. Blackburn, I do favor it. Here is the thing.

MRS. BLACKBURN. Okay.

MR. MAKAWA. This is not--

MRS. BLACKBURN. No, I just need a yes or no from you, we are quick on time.

Okay, Ms. Kenney, you favor build-out?

MS. KENNEY. Yes.

MRS. BLACKBURN. Okay, all right. That is--and Mr. Riddle?

MR. RIDDLE. I think that is one remedy. I do favor correcting market--

MRS. BLACKBURN. You favor build-out, okay. You see that--

MR. RIDDLE. Well perhaps.

MRS. BLACKBURN. Perhaps?

MR. RIDDLE. Yes.

MRS. BLACKBURN. Mr. May?

MR. MAY. No.

MRS. BLACKBURN. You do not favor build-out, okay. See, when you talk about freeing up the marketplace and you talk about opening up and having access, I get a little bit confused when you say you favor build-out. Now Mr. Makawa go ahead and finish what you were going to say very fast, 30 seconds.

MR. MAKAWA. Thirty seconds. If these people are not going to build-out, but we know that we have got community to spend in excess of $700 billion a year and they are going to go into Brentwood instead of going into Compton, then we are going to have issues.

MRS. BLACKBURN. Okay, all righty. You know, I do not see how you can be on both sides of that argument but if it is your opinion, it is your opinion.

Very quickly some of you have mentioned net neutrality. I will tell you what I want to do with that and just have you respond to me in writing. When we look at Section 201 and then you go in and we have a study in here Point C is a study. I would like to hear from each of you how you would define that neutrality and how you would address that issue. If you conducted this study on behalf of your members, on behalf of the groups that you work with, then what would you want us to know? How would you write that provision? How would you have the FCC address that?

And Mr. May, I am going to come to you with my last question. I am down to 58 seconds. The DACA project, I have read some on that. I appreciate the work that you all have done on this project and I agree completely with two of the premises that you mentioned, that the markets are increasingly competitive, and with the technological developments that service based regulatory categories that we have got to look at one kind of regulation for Telcom and other for information and another for cable. And I would like for you just to talk a little bit for, we have got 19 seconds so it might not even be possible about how you would approach that division in regulation on services, not on technology, but on services.

MR. MAY. Well, thank you, Congresswoman. It is really important to replace the service definitions including cable operator, that kept coming up this morning and all the others which are based on what I have called the techno functional constructs. They are all linked to technical characteristics and functional capabilities. Just replace all of those with a provision or the heart of the new act should be typing regulatory activity to a competition standard so that the regulator is judging whether to intervene based upon where there is a potential for anti-competitive abuse. We have suggested as you know in our DACA project, a standard that does that. It is an anti-trust like standard. It is not totally coincident with the anti-trust laws. But in that way when there is an allegation of abuse, say a net neutrality-like allegation, then the FCC would look at the particular circumstances of the allegation, it would look at the market power, the market structure, the potential entry, the technological dynamism, and it would make a decision on that case and it could impose a remedy that would be very particular. It is very important in this environment we are in now, where the technology is changing so quickly, the marketplace is changing, to establish a regime in which the regulation takes place--

MRS. BLACKBURN. Mr. May if I can cut you off right there. Let me just--but what you are--also this would be a more flexible structure to work from and--

MR. MAY. It would be absolutely more flexible and it would not--

MRS. BLACKBURN. --would allow for new and emerging technologies and delivery systems.

MR. MAY. Exactly. You would not anticipate in advance all of the potential harms which may then well cut off the new technologies, the new services because you have anticipated too broadly without understanding what developments may take place. So it is more flexible. It is more targeted, but it also allows you to remedy true marketplace abuses.

MRS. BLACKBURN. Abuse problems. Thank you, sir, I appreciate that.

Mr. Chairman, thank you.

MR. UPTON. Mr. Markey wants me to ask, as we conclude this hearing, if you had one thing you wanted us to remember from your testimony today that we should think about as we mark-up next week, if you could try to sum it up in 30 seconds each. We will start at this end since you were gone from the room, but Mr. Makawa we will go right down the line and then we will finish up the hearing. Mr. Makawa, one thing for us to remember next week.

MR. MAKAWA. Do not try to regulate the Internet. It is the biggest aggregator and that is the one leveling playing field that is going to gravitate from where we are currently. There are developments that are happening with the telcos and the cable companies, that needs to play itself out but until some of these companies can behave like good little boys and good little girls, somebody needs to be the watch dog.

MR. UPTON. Mr. May?

MR. MAY. In 1980, I was Associate General Counsel at the Federal Communications Commission and I remember at that time when Congress was beginning to look at telecommunications reform of the existing 1934 Act, sitting in Mr. Markey's office for one long evening talking about how we need a new act, how the world was beginning to change at that time. It was a wonderful conversation. So the thing that I would want all of you to remember is that fortunately due to technological change we are in a very much different environment than we were when Mr. Markey and I had that conversation back in 1980 here in 2005. Thank you very much.

MR. UPTON. Ms. Kenney?

MS. KENNEY. I would urge the committee to consider that as you look at a national franchising model, you are giving a lot of local control up and a lot of consumer protection up in the form of customer service standards and local enforcement and build-out requirements. And so as you move to a national franchise, which we do not object to, you have got to figure out how to maintain those protections at the national level to ensure that if competition comes, it comes to everyone.

MR. UPTON. Mr. Riddle?

MR. RIDDLE. Local design and control, standardize PEG funding, standardized PEG channel capacity, Federal minimum supersedes State law and protect this agreement against the migration of services to an IP or other technically different system.

MR. UPTON. Ms. Johnson?

MS. JOHNSON. That consumers will benefit from multiple platforms by way of diverse content, lower prices, more choice, and to couple with that an understanding and respect for the fact that minorities are high value customers.

MR. UPTON. Thank you. Ms. Rodriguez-Lopez?

MS. RODRIGUEZ-LOPEZ. Thank you so much again, Mr. Chairman. You are a very patient man. I appreciate you giving me the time to go out.

I am going to draw an analogy. When I was asked how I felt about abortion rights and the constitutional right, I said there are protections that exist in the constitution, the right to bear arms because reasonable people call on certain things when they require them. This bill must contain the anti-discrimination provisions. It must contain those protections. If we believed that every one would always do the right thing at the right time, we would not have laws in place to govern. And so in an ideal world, everyone will be deployed equally and benefit from competition, but we also know that we have a history of not always doing the right thing. So thank you so much for this opportunity.

MR. UPTON. Well again, I want to thank all of you for being patient with us since we started seven hours ago and appreciate your testimony. I told my friend, Mr. Markey, that we intend to have opening statements next week on Tuesday at 5:00. We will do opening statements as long as it takes. I know it is 6:30, so there is a doorstop there and we will resume with the markup then on Wednesday, at 10:00 a.m., and hopefully be finished on Wednesday, but if we have to carry over to Thursday we will. So with that, again I appreciate everyone's testimony and we are now adjourned.

[Whereupon, at 4:55 p.m., the subcommittee was adjourned.]

SUBMISSION FOR THE RECORD BY BOB FREUDENTHA, PRESIDENT, AMERICAN PUBLIC WORKS ASSOCIATION

Mr. Chairman and members of the committee, thank you for the opportunity to submit this testimony for the hearing titled Communications Promotion and Enhancement. My name is Bob Freudenthal, President of the American Public Works Association (APWA), and Deputy General Manager of the Hendersonville Utility District in Hendersonville, TN. I submit this statement today on behalf of the 27,000 public works officials who are members of APWA, including our nearly 2,000 public agency

members. We appreciate the opportunity to submit a statement with regard to this new legislation.

APWA is an organization dedicated to providing public works infrastructure and services to millions of people in rural and urban communities, both small and large. Working in the public interest, APWA members design, build, operate and maintain transportation and rights-of-way; natural gas, electricity and steam distribution facilities; water supply, sewage, and refuse disposal systems; public buildings and other structures and facilities essential to our nation's economy and way of life.

I appreciate the opportunity to address the important role local governments and public works departments play in managing local public rights-of-way and how local franchising supports that role. APWA has been and will continue to be an advocate for the development of policies which ensure the safe and efficient management of public rights-of-way. We urge your support for two important principles relating to local governments and rights-of-way management when advancing legislation to rewrite the nation's communications laws and policies.

The first is that local government officials have a fiduciary responsibility on behalf of the citizens we serve to manage public property, including the public rights-of-way, a public asset with an estimated value of more than $7 trillion. Respect for local control and local governments' long-standing authority to manage rights-of-way is necessary to ensure their safe and efficient operation. It is vital that local governments and other public agencies retain their authority to fulfill their statutory obligations and duties related to managing public rights-of-way.

This authority includes the ability to establish permit, location, inspection and pavement restoration controls and rights-of-way restoration; to encourage cooperation among and develop scheduling and coordination mechanisms for all rights-of-way users; to obtain and maintain accurate information for locating existing and new facilities in the public rights-of-way; to hold responsible parties accountable for the restoration of the public rights-of-way; and to charge and receive compensation for the use of the public rights-of-way.

The second principle is that local governments support competition in communications services and technology. We embrace innovations that make possible competition in video, telephone and broadband services. Moreover, we support deployment of these technologies as rapidly as possible. However, as new communications technologies and services enter the marketplace, local governments must be kept whole and our authority to manage public rights-of-way preserved.

We share the concerns of our local government partners regarding the impact of the legislation on managing rights-of-way. Without a franchise agreement, the only effective mechanisms that local government has to manage its public rights-of-way, ensure competition for everyone and collect franchise fees are eliminated. Another concern is that, although the legislation preserves local authority over the management of rights-of-way, it does not provide sufficient enforcement authority to assure compliance. In addition, while the legislation is silent on the appropriate forum for resolving local rights-of-way disputes, by default that task would move to the Federal Communications Commission.

Preserving full local franchising authority is critically important to rights-of-way management. Franchises do not just provide permission to offer video services; they are the core tool local governments use to manage streets and sidewalks, provide for public safety and emergency response capability, enhance competition and collect compensation for private use of public land. Eliminating or limiting local franchises will cause chaos, undermine safety and deprive local government of the power to perform its basic functions.

Public agencies have the responsibility to keep public rights-of-way in a state of good repair and free of unnecessary encumbrances. The public expects local

governments to ensure that the deployment of new services does not result in potholes, traffic backups and congestion, damaged sidewalks, ruptured water or gas lines, disrupted electrical power or diminished community aesthetics, particularly with respect to managing above ground versus below ground installations.

The right to obtain and use land for public benefit is a long-standing tradition and is provided for by law. For more than a century, the concept of accommodating both public and privately owned utilities in the public rights-of-way has been recognized to be in the public interest. Public rights-of-way are normally acquired and developed by public agencies for transportation routes, water supply, waste disposal, power distribution, means of communications and similar services. Such services are provided for the common good of the public, and are generally authorized and directed by public agencies, which have an obligation to regulate and manage the use of public rights-of-way in the interest of the convenience, health, safety and welfare of the public.

It is our duty and responsibility as public agencies and that of elected officials to be good stewards of the public rights-of-way and to adopt reasonable ordinances that allow public officials to: manage the public rights-of-way on behalf of their citizens to ensure public health, safety and convenience; manage the surface of the public rights-of-way to ensure structural integrity, availability, safety and a smooth street surface for the traveling public; manage the space below the surface of the public rights-of-way to ensure safe and economical access for all current and future users of the rights-of-way; and manage the space above the surface of the public rights-of-way, including the placement of overhead utility facilities, to ensure efficient use of space and to minimize safety hazards and impact on community aesthetics.

As the pace of implementing new communications technologies accelerates, the number of damages incurred by owners of both private and public utilities is sure to grow, if local governments are not allowed to manage their rights-of-way. Managing public rights-of-way is complex, and decisions regarding management and control of local public rights-of-way belong to local governments. Each utility provider installs a separate system in its own unique location within the public rights-of-way. The systems are often installed on existing pole lines, in narrow trenches or in conduits that are bored into place. There is a correlation between the number of excavations and corresponding damage, and repeatedly cutting and repairing streets can permanently damage street pavement structures. Moreover, in the absence of compensation from utilities, taxpayers bear the burden of significantly increased street maintenance costs.

APWA has a Utility and Public Rights-of Way Technical Committee whose members provide education and information to raise awareness and promote the best use of the public rights-of-way for the public good. Our committee provides a forum where stakeholders can come together to discuss common issues and best management practices that will promote the effective integration of all users and stakeholders within the public rights-of-way.

In conclusion, APWA supports competition and the rapid deployment of communications technologies and services in the communities we serve. We support a balanced approach that encourages innovation and preserves local governments' long-standing authority to manage public rights-of-way and to receive fair and reasonable compensation for their use. Franchising authority is a core tool local governments use to manage rights-of-way in the public interest in order to protect public safety and public infrastructure.

Mr. Chairman, we are especially grateful to you and Committee members for the opportunity to submit this statement. APWA and our members stand ready to assist you and the Committee in any way we can.

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RESPONSE FOR THE RECORD BY WALTER MCCORMICK, PRESIDENT AND CHIEF EXECUTIVE OFFICER, UNITED STATES TELECOM ASSOCIATION

The Honorable Barbara Cubin

Question 1

The scope of Section 717's "rights, duties and obligations" clause is restricted to those rights, duties and obligations set out in Sections 251 and 252 of the Telecommunications Act of 1996. Those sections deal exclusively with interconnection and do not apply to universal service contribution or reimbursement, which are dealt with in Sections 214 and 254. If VoIP providers are to be accorded the same rights, duties and obligations under Sections 251 and 252 as telecommunications service providers, they should also have the same social obligations, including being required to contribute to the universal service fund.

The Honorable Anna Eshoo

Question 1

Yes, up to now the Internet has experienced significant growth and innovation precisely because the government has maintained a virtual hand-offs approach. However, this so called "Net Neutrality" regulation, and I take strong exception to the name because I believe it is extremely misleading, would dramatically alter the way the Internet works today— replacing the freedom to innovate and American entrepreneurial spirit with heavy-handed government interference.

Today, consumers have a variety of choices in obtaining high speed internet access. They can choose high speed internet access from cable, from DSL, from wireless, from satellite, and in some areas from new technologies such as wi-fi and wi-max systems or Broadband Over Power Line. According to the FCC, as of June 2005, consumers living in 75% of zip codes have three or more high speed lines in service to choose from, 60% of zip codes have four or more high-speed lines to choose from, and 17.5% of zip codes have ten or more high-speed lines to choose from. In California, on April 27th, the California Public Utilities Commission voted to allow the state's electric utilities to deploy broadband over power line technology, and in doing so, cited a California PUC report that in the state's most densely populated areas -- metropolitan San Francisco, Los Angeles and San Diego – consumers have up to 23 choices for high-speed internet access. Indeed, among the many choices consumers have for high-speed internet access is that offered by Google and Earthlink which provides consumers with a fast lane of 1Mbps for $20 per month, or a slower lane of 300Kbps that is offered without charge in exchange for viewing local advertising through Google. (This latter offering, of course, comes at some cost in time spent wading through ads and in consumer privacy.)

In San Francisco, and across the nation, the number of broadband providers is exploding due to the fact that anyone who is willing to invest has the ability to enter the business free of archaic, stifling, and discriminatory economic regulation. Indeed, the number of high speed providers in the United States nearly tripled, from 485 to 1,270, between June 2004 and June 2005. This is extraordinary growth, given the fact that in

June 2001 there were just 160 such providers around the country. One of the biggest investors in high-speed internet access is Google, which has found it easy to enter the market both through investments in both wireless and BPL technologies.

As a result of this broad choice and intense competition, prices for internet access have fallen and penetration has increased. On May 28th, the Associated Press reported that "Middle and working-class Americans signed up for high-speed internet access in record numbers in the past year, apparently lured by a price war among phone companies."

Clearly, consumers are benefiting from the free market environment. According to the Associated Press, citing a survey by the Pew Internet and American Life Project:

- Broadband adoption increased 59 percent from March last year to March 2006 among U.S. households with incomes between $30,000 and $50,000.
- It increased 40 percent in households making less than $30,000 per year
- It increased 121 percent among blacks.
- Overall, 42 percent of adult Americans, or 84 million people, have broadband, compared to 30 percent a year ago.

Therefore, it is clear that the marketplace is working. There is no problem that requires Congressional action. Telephone and cable companies have indicated that they will not block, impair or degrade access to any website, and they are not doing so. If they did, the Chairman of the FCC has said that he has the authority to stop them, and that he will use it. And, with the choices available, consumers would clearly go elsewhere.

But, all this investment, all this innovation, could come to an end if the government begins adding new regulation. Wall Street has warned that enacting "Net Neutrality" regulations in the absence of a definable problem would be premature and could trigger substantial, negative unintended consequences. As Craig E. Moffitt, a VP and senior analyst at Sanford C. Bernstein and Co., told the Senate Commerce Committee in March:

> "Mandated "Net Neutrality" would further sour Wall Street's taste for broadband infrastructure investments, making it increasingly difficult to sustain the necessary capital investments. It would also likely mean that consumers alone would be required to foot the bill for whatever future network investments that do get made. That would result in much higher end-user prices, much steeper subsidies of heavy users by occasional ones, and, in all likelihood, a much sharper 'digital divide.' … The United States as a whole would, in all likelihood, fall further behind other countries in broadband availability and reliability."

Many of the leading telecom manufacturers, such as 3M, ADC and Cisco, have all expressed similar reservations about prematurely enacting "Net Neutrality" regulations.

The Internet is the success it is today because the government has maintained a vigilant, hands-off approach that has allowed companies to innovate in direct response to the evolving wants and needs of their customers. The marketplace today is competitive, and as the barriers to entry are low, the market is also contestable. Regulatory or legislative solutions wholly without justification in marketplace activities would stifle, not enhance the Internet. Laws can be inflexible and difficult to fine-tune—particularly when applied to technologies that are rapidly evolving.

Question 2

"Tiered" internet is your term, not ours. It is inaccurate and misleading. There are, today, voice networks, data networks, and various managed networks and virtual private networks that provide increased level of security and reliability for financial, governmental, and healthcare purposes that all operate on internet protocol and involve various levels of prioritization. We are not proposing to change the internet experience.

We have indicated that we will not block, impair or degrade access to any website. The internet experience that the consumer has today, and that those who operate websites have today, they will have tomorrow. The consumer will be in control of making his or her own choices with regard to the amount of speed and bandwidth purchased. This is as it should be. Consumers should not be forced to purchase a higher level of speed simply because a Google, or an Amazon, or some other company wants to profit off of offering a new service that would benefit from a higher speed.

There is nothing that telephone or cable companies have proposed that would inhibit the next Jeff Bezos to build an on-line bookstore, or the next Google to come along. Indeed, to the contrary, locking new "Net Neutrality" rules in place would actually hurt new, innovative companies from competing against established Internet companies as such rules would make it more difficult for start-up companies to differentiate themselves in the market.

Currently, Google is spending $800 million on servers and other electronics to be deployed all over the country to speed access to its websites. How many start ups have $800 million on hand to do the same thing? The fact is that one way a start-up can compete with Google, and one way consumers would benefit from more competition for Google-type services, is if the start-up could purchase private network services to compete on a more equal footing.

Allowing commercial arrangements with companies that seek to purchase high levels of security and reliability from network providers may be one way for new companies to distinguish themselves in the market and compete with incumbents like Google and Amazon.

Our member companies simply want to deliver an additional choice—both to consumers and to business.

RESPONSE FOR THE RECORD BY PAUL MISENER, VICE PRESIDENT FOR GLOBAL PUBLIC POLICY, AMAZON.COM

VIA EMAIL AND US MAIL

June 7, 2006

The Honorable Anna Eshoo
Member
Subcommittee on Telecommunications and the Internet
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Representative Eshoo:

Thank you very much for your support for meaningful, enforceable "net neutrality" legislation. Thank you also for your two additional questions after the Subcommittee's recent hearing on the subject. Please accept my apologies for being so tardy with my response; I was traveling in Europe. My answers follow each of your questions below:

Q1. As indicated in my opening statement, I have great concerns about where this legislation could lead the Internet, and your testimony certainly does nothing to allay those fears. In Silicon Valley, we take it as an article of faith that the reason the Internet has flourished and become the most important instrument of change in our lifetime is its

open architecture. Anyone in the world can post virtually anything they wish on the Net, and it can be viewed by anyone else in the world, without barriers. Most broadband providers say the concerns you and I share regarding the preservation of "Net Neutrality" are speculative and farfetched. So, is this a real problem? Is it necessary to protect "Net Neutrality"?

A1. Yes, the problem is real, and net neutrality needs to be protected by law, as it was before last summer. It reasonably is an article of faith that the openness of the Internet was the reason it flourished with the obvious benefits to consumers and innovation. But, in ways never before possible, consumer broadband Internet service providers (the phone and cable companies) recently have acquired the technical means and regulatory permissions to restrict that openness, and several of their top executives have announced their plans to do so. And, because there are, and will be for the foreseeable future, only one or two such network operators widely available to consumers, they have the ability to constrict content choice without losing business.

Amazon seeks to reinstate the historic non-discrimination rules, dropped by the FCC last summer, in order to ensure that our customers retain unimpaired access to our current and future content and services without us having to seek permission from network operators, both here and abroad.

Some of these network operators say that government should let the competitive free market work. Yet, as I noted before, the market is far from competitive: in the U.S., according to the FCC, some 99.5% of residential broadband subscribers get their advanced (broadband) Internet access from a phone company or a cable company and, of course, such a duopoly is not meaningfully competitive. (The situation is at least as bad elsewhere around the world, where state-owned operators often have an absolute monopoly.) The network operators also say net neutrality would regulate the Internet for the first time. Not true. As I indicated above, consumer Internet access <u>has</u> been regulated. Until last summer, federal non-discrimination rules governed most, and arguably all, American consumers' Internet access. Similar rules are in place, but under attack, in other countries, including Germany.

So we are on the side of maintaining the open paradigm of the Internet. It has been good for our customers and for innovative companies, including many in Silicon Valley. Years from now, we hope to see vibrant competition among broadband network operators. But until then, we will continue to oppose efforts by the network operators to leverage their position over access to artificially constrain consumer choice and content provider innovation.

Q2. There's been a lot of discussion about "tiers" on the Internet, and I'd like you to help clear up what we're really talking about. The telephone companies maintain that they need to have the flexibility to manage the network to ensure performance and security. Internet companies that I have spoken with acknowledge that these are important concerns, and support some sort of controls that would manage the traffic for the benefit of all. Please distinguish for us what network management is necessary to make the Internet function well for all of us and what network management would likely have only an anti-competitive purpose?

A2. The fairly simple answer is that network management, with few exceptions (*e.g.*, for law enforcement and anti-spam efforts) should be allowed only on a non-discriminatory basis – *i.e.*, without regard to the source or ownership of the bits being transmitted. That is, network operators may decide to prioritize (give faster speeds to), *e.g.*, Internet video

services over, say, transmission of static data files, but they may not prioritize based on the source of the Internet video service or who owns the video bits. Or they may choose to prioritize telemedicine traffic over all other traffic. But they must not be allowed to favor one health care organization over another. Otherwise the network operators become the equivalent of HMOs, deciding which medical services are most readily available to consumers.

Of course, we believe they should be allowed (as many do today) to charge different rates for different capacity. But again, this sort of "tiering" (where, for example a 24/7 gamer would pay more per month than an occasional email sender, or where Amazon.com pays more for access than a small website because we need more capacity to connect to the Internet) must not be discriminatory, favoring some bits over others on the basis of their source or ownership. In sum, we believe that non-discriminatory network management and end-user tiering, both at the consumer and content provider connections to the Internet, should be permitted.

Thank you again for your interest in net neutrality and for your support for reinstating longstanding nondiscrimination safeguards.

Sincerely yours,

Paul Misener
Vice President for Global Public Policy
Amazon.com

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